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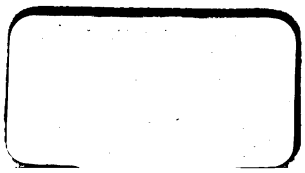

PROCEEDINGS

OF THE

NEBRASKA STATE BAR ASSOCIATION

VOLUME I

1900-1902

LINCOLN:
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1903

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LINCOLN, NEB.

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75628

OFFICERS, 1902

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SAMUEL P. DAVIDSON,	Tecumseh

VICE-PRESIDENTS

W. H. KELLIGAR,	Auburn
A. W. CRITES,	Chadron
W. T. WILCOX,	North Platte

SECRETARY

ROSCOE POUND,	Lincoln

TREASURER

CHARLES A. GOSS,	Omaha

MEMBERS OF THE EXECUTIVE COUNCIL

ANDREW J. SAWYER,	Lincoln
RALPH W. BRECKENRIDGE,	Omaha
EDMUND H. HINSHAW,	Fairbury

TEMPORARY ORGANIZATION, 1900

PRESIDENT

ELEAZER WAKELEY, Omaha

VICE-PRESIDENT

MANOAH B. REESE, Lincoln

SECRETARY

W. P. MCCREARY, Hastings

TREASURER

SAMUEL P. DAVIDSON, Tecumseh

OFFICERS, 1900

PRESIDENT

ELEAZER WAKELEY, Omaha

VICE-PRESIDENT

MANOAH B. REESE, Lincoln

SECRETARY

ROSCOE POUND, Lincoln

TREASURER

SAMUEL P. DAVIDSON, Tecumseh

MEMBERS OF EXECUTIVE COUNCIL

RALPH W. BRECKENRIDGE, Omaha
ANDREW J. SAWYER, Lincoln
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OFFICERS 1901

PRESIDENT

WILLIAM D. MCHUGH,	Omaha

VICE-PRESIDENTS

FRANCIS MARTIN,	Falls City
A. D. MCCANDLESS,	Wymore
O. A. ABBOTT,	Grand Island

SECRETARY

ROSCOE POUND,	Lincoln

TREASURER

S. L. GEISTHARDT,	Lincoln

MEMBERS OF EXECUTIVE COUNCIL

ANDREW J. SAWYER,	Lincoln
RALPH W. BRECKENRIDGE,	Omaha
EDMUND H. HINSHAW,	Fairbury

CONSTITUTION

(Adopted June 18, 1900)

We, the undersigned members of the bar of Nebraska, desiring to effect an organization for the promotion of the administration of justice according to law, and for the advancement of the honor and dignity of our profession and encouragement of cordial intercourse among the members thereof, have adopted the following constitution for ourselves and our successors and associates:

ARTICLE I

NAME

The name of this Association shall be the Nebraska State Bar Association.

ARTICLE II

MEMBERSHIP

Any person shall be eligible to membership in this Association who shall be a member of the bar of Nebraska in good standing and shall be nominated as hereinafter provided.

ARTICLE III

OFFICERS

The officers of this Association shall be a president, three vice-presidents, a secretary, and a treasurer. Such officers shall be elected at the annual meeting of the Association for a term of one year. In addition thereto, at the first regular meeting of the Association, there shall be elected three members of the Council of the Association: one for a term of one year, one for a term of two years, and one for a term of three years, and thereafter, as such terms shall expire, members of the Council shall be elected for a term of three years.

The president shall preside at all meetings of the Association and of the Council, and shall perform the duties usually belonging to such office. He shall also deliver an address at the regular meeting of the Association next succeeding his election.

The vice-presidents in the order of their election shall preside at meetings of the Association in the absence of the president, and perform such other duties as usually pertain to such office.

The secretary shall be the custodian of the records and archives of the Association, shall be the editor of its publications, and shall preserve and record its transactions.

The treasurer shall be the custodian of the moneys of the Association, which he shall disburse under the authority of the Council upon warrant of the president and secretary.

The Council shall consist of the president and secretary of the Association for the time being and the three members above provided for. In addition to the other duties hereinafter provided, it shall be the executive organ of the Association, shall provide suitable programs and entertainment at the meetings thereof, recommend by-laws from time to time as they appear to be required, and nominate officers to be voted upon by the Association, except members of the Council. In case of vacancy in the membership of the Council, it shall have the power to elect a member to fill such vacancy until the next regular meeting of the Association.

ARTICLE IV

COMMITTEES

As soon as possible after the regular annual meeting of the Association, the president shall appoint four standing committees for the year ensuing, to consist of not less than three members each, to-wit: (1) A committee on law reform, (2) a committee on judicial administration and remedial procedure, (3) a committee on legal education, (4) a committee on legislation affecting the profession.

Each of said committees shall present a report at the regular meeting of the Association next succeeding its designation.

ARTICLE V

ELECTION OF MEMBERS

Applications for membership shall be in writing, signed by the applicant and by three members of the Association who shall recommend the applicant. They shall thereupon be presented to the Council, and, if approved by the Council prior to a regular meeting, shall be presented to the meeting and considered elected, unless a vote thereon is required by some member. In such case the applicants approved by the Council shall each be voted upon by ballot, and ten negative votes shall defeat any applicant proposed.

ARTICLE VI

BY-LAWS

Suitable by-laws not inconsistent with this constitution may be provided by a majority of votes at a regular meeting.

ARTICLE VII

DUES AND FEES

The initiation fee, payable at the time of election to membership, shall be one dollar, which shall be in full of all dues for the first year. Thereafter each member shall pay to the treasurer as annual dues the sum of one dollar.

ARTICLE VIII

MEETINGS

The Association shall have one regular meeting annually at a time and place to be fixed by the Council three months prior to such meeting. Immediately upon the designation of the time and place of such meeting by the Council, each member of the Association shall be notified thereof by the secretary by mail. If the Council so orders, the proceedings of such meetings may be edited and published in a suitable form by the secretary, and a copy thereof furnished to each member free of charge.

ARTICLE IX

AMENDMENTS

Amendments to this constitution recommended by a three-fifths vote of the Council may be adopted by a majority of the Association present at any regular meeting. Amendments not so recommended must be submitted in writing at a regular meeting, and they shall then lie over until the next meeting, when they may be adopted by a vote of three-fourths of the members of the Association present, provided such proportion shall exceed twenty-five.

ROLL OF MEMBERS

1902

Abbott, O. A.,	Grand Island
Abbott, N. C.,	Houston, Tex.
Adams, C. E.,	Superior
Adams, J. H.,	Omaha
Albert, I. L.,	Columbus
Allen, W. V.,	Madison
Ames, J. H.,	Lincoln
Andrews, I. R.,	Omaha
Baldwin, J. N.,	Council Bluffs, Ia.
Barnes, J. B.,	Norfolk
Barsby, J.,	Fairmont
Bartlett, E. M.,	Omaha
Battin, J. W.,	Omaha
Baxter, I. F.,	Omaha
Bennett, T. E.,	York
Bittner, M. E.,	Osceola
Bibb, R. S.,	Beatrice
Bishop, A. L.,	Bartlett
Bishop, John S.,	Lincoln
Blackburn, Thos. W.,	Omaha
Blackledge, L. H.,	Red Cloud
Boyd, J. F.,	Oakdale
Breckenridge, Ralph W.,	Omaha
Breen, John P.,	Omaha
Broady, J. H.,	Lincoln
Brogan, Francis A.,	Omaha
Brome, H. C.,	Omaha
Brown, O. P. M.,	Omaha
Brown, E. E.,	Lincoln
Brown, E. W.,	Lincoln
Brown, Norris,	Kearney
Brown, J. H.,	Wakefield

Buchanan, J. J.,	Hastings
Burnett, A. H.,	Omaha
Burbank, B. G.,	Omaha
Burdick, F. W.,	Wayne
Burr, L. C.,	Lincoln
Button, W. F.,	Hastings
Bryant, Wilbur F.,	Lincoln
Caldwell, W.,	Broken Bow
Calkins, E. C.,	Kearney
Campbell, D. A.,	Lincoln
Capron, Clarence A.,	Hebron
Cheney, L. H.,	Beatrice
Christy, S. W.,	Edgar
Clapp, C. E.,	Omaha
Clark, Byron,	Plattsmouth
Clements, E. J.,	Lincoln
Colby, L. W.,	Beatrice
Comstock, W. B.,	Lincoln
Congdon, I. E.,	Omaha
Cook, E. A.,	Lexington
Corcoran, G. F.,	York
Corson, W. A.,	Omaha
Cosgrave, P. J.,	Lincoln
Cowin, J. C.,	Omaha
Crane, T. D.,	Omaha
Crawford, Frank,	Omaha
Crites, A. W.,	Chadron
Davidson, Samuel P.,	Tecumseh
Day, George A.,	Omaha
Delamatre, C. W.,	Omaha
Deweese, J. W.,	Lincoln
Donisthorpe, F. B.,	Geneva
Dryden, J. N.,	Kearney
Duffie, E. R.,	Omaha
Dundey, C. L.,	Omaha
Dwyer, D. A.,	Plattsmouth
Ehrhardt, John A.,	Stanton
Elgutter, C. S.,	Omaha
English, J. P.,	Omaha

Erwin, O. S.,	Omaha
Evans, R. E.,	Dakota City
Farnsworth, E. T.,	Omaha
Ferguson, A. N.,	Omaha
Fisher, A. G.,	Chadron
Flaherty, D. J.,	Lincoln
Flansburg, C. C.,	Lincoln
Fleming, M. H.,	Crete
Foss, F. I.,	Crete
Fuller, F.,	Wayne
Garlow, C. J.,	Columbus
Gaslin, Wm.,	Kearney
Geisthardt, S. L.,	Lincoln
Gering, Matt,	Plattsmouth
Giffin, W. D.,	Gothenburg
Gillan, G. C.,	Lexington
Glanville, R. C.,	Grand Island
Godfrey, G. L.,	Minden
Good, B. F.,	Wahoo
Goss, Charles A.,	Omaha
Gray, E. F.,	Fremont
Greene, C. J.,	Omaha
Greene, R. J.,	Lincoln
Greenlee, A. G.,	Lincoln
Grimes, H. M.,	North Platte
Grimison, J. A.,	Schuyler
Gurley, W. F.,	Omaha
Guthrie, Grant,	Harrison
Gutterson, C. L.,	Broken Bow
Hager, G. E.,	Lincoln
Hainer, E. J.,	Aurora
Haller, C. W.,	Omaha
Hall, M. A.,	Omaha
Hall, W. P.,	Holdrege
Hall, F. M.,	Lincoln
Hamer, F. G.,	Kearney
Hamer, T. F.,	Kearney
Hanna, J. R.,	Greeley
Hamilton, J. W.,	Omaha

Harrison, T. O. C.,	Grand Island
Hartigan, M. A.,	Hastings
Harvey, A. E.,	Lincoln
Hastings, W. G.,	Wilber
Hayward, W. H.,	Nebraska City
Higginbotham, C. E.,	Hastings
Hinshaw, E. H.,	Fairbury
Holmes, E. P.,	Lincoln
Holmes, L. D.,	Omaha
Hopewell, M. R.,	Tekamah
Horth, R. R.,	Grand Island
Irvine, Frank,	Ithaca, N. Y.
Jackson, N. D.,	Neligh
Johnson, D. L.,	Omaha
Kearney, A. A.,	Stanton
Keester, R. L.,	Alma
Kelligar, W. H.,	Auburn
Kelley, W. R.,	Omaha
Kennedy, J. A. C.,	Omaha
Kennedy, H., Jr.,	Omaha
Keysor, W. W.,	St. Louis, Mo.
Kilian, J. N.,	Columbus
Kinkaid, M. P.,	O'Neill
King, M. D.,	Minden
King, E. L.,	Osceola
Kinsler, J. C.,	Omaha
Kohout, B. V.,	Crete
Kretsinger, E. O.,	Beatrice
Lambertson, G. M.,*	Lincoln
LaMaster, Hugh,	Tecumseh
Landis, H. D.,	Seward
Langdon, Martin,	Omaha
Learned, M. L.,	Omaha
Letton, C. B.,	Fairbury
Lobingier, C. S.,	Omaha
Logan, C. P.,	Grant
Loomis, Geo. L.,	Fremont
Mackey, J. W.,	Stanton

*Died June 14, 1902.

Macomber, J. H.,	Omaha
Mahoney, T. J.,	Omaha
Manderson, C. F.,	Omaha
Marshall, T. C.,	Hebron
Marston, Ira D.,	Kearney
Martin, O. E.,	Wakefield
Martin, W. A.,	Emerson
Martin, Francis,	Falls City
Mathew, H. M.,	Loup City
Matters, T. H.,	Harvard
Maxwell, H. E.,	Omaha
McAllister, W. A.,	Columbus
McCoy, F. L.,	Omaha
McCreary, W. P.,	Hastings
McCandless, A. D.,	Wymore
McCullough, J. H.,	Omaha
McDonald, Chas. G.,	Omaha
McHugh, Wm. D.,	Omaha
McIntosh, J. H.,	Omaha
McPheeley, J. L.,	Minden
Meeker, C. W.,	Imperial
Meserve, W. A.,	Creighton
Miller, Matt.,	David City
Montgomery, C. S.,	Omaha
Montgomery, C. C.,	Omaha
Moore, R. E.,	Lincoln
Morgan, Alpha,	Broken Bow
Morgan, Chas. E.,	Omaha
Morning, W. M.,	Lincoln
Morrisey, A. M.,	Valentine
Morsman, W. W.,	Omaha
Neal, B. F.,	Auburn
Nightingale, R. J.,	Loup City
Nightingale, T. S.,	Loup City
Norberg, G.,	Holdrege
Norval, R. S.,	Seward
O'Connor, J. J.,	Omaha
Oldham, W. D.,	Kearney
Olson, A. R.,	Wisner

Owens, E. D.,	Cozad
Page, E. C.,	Omaha
Patrick, R. W.,	Omaha
Patterson, C.,	Rushville
Patterson, T. C.,	North Platte
Paul, J. N.,	St. Paul
Pearne, W. S.,	Grand Island
Pettis, E. F.,	Lincoln
Phelps, C. J.,	Schuyler
Porter, J. E.,	Crawford
Pound, Roscoe,	Lincoln
Pritchett, Geo. E.,	Omaha
Price, W. B.,	Lincoln
Prout, F. N.,	Beatrice
Ragan, John M.,	Hastings
Ramsey, A. D.,	Blue Hill
Raper, John B.,	Pawnee City
Rawls, C. A.,	Plattsmouth
Reavis, C. F.,	Falls City
Redick, W. A.,	Omaha
Reed, W. E.,	Madison
Reese, M. B.,	Lincoln
Richards, C. L.,	Hebron
Riley, Chas.,	Albion
Rinaker, Samuel,	Beatrice
Robbins, C. A.,	Lincoln
Robbins, A. M.,	Ord
Roberts, C. H.,	Holdrege
Robertson, W. M.,	Norfolk
Rooney, J. A.,	Nebraska City
Rose, H. F.,	Lincoln
Sawyer, A. J.,	Lincoln
Scott, E. H.,	Omaha
Searle, S. A.,	Omaha
Sedgwick, S. H.,	York
Seymour, C. W.,	Nebraska City
Sheean, J. B.,	Omaha
Shields, G. W.,	Omaha
Shepherd, Fred'k,	Lincoln

Simeral, E. W.,	Omaha
Sinclair, H. M.,	Kearney
Slabaugh, W. W.,	Omaha
Sloan, C. H.,	Geneva
Sloan, R. J.,	Geneva
Smith, Howard B.,	Omaha
Smith, Ed P.,	Omaha
Stewart, John M.,	Lincoln
Stevens, J. C.,	Hastings
Stevens, W. T.,	Lincoln
Strode, J. B.,	Lincoln
Strode, E. C.,	Lincoln
Strickler, V. O.,	Omaha
Sullivan, A. N.,	Plattsmouth
Switzler, Warren,	Omaha
Talbot, A. R.,	Lincoln
Tefft, C. A.,	Weeping Water
Tibbetts, A. S.,	Lincoln
Thomas, E. E.,	Omaha
Thomas, G. H.,	Schuyler
Thomas, J. J.,	Seward
Thompson, Wm. H.,	Grand Island
Thompson, Will H.,	Omaha
Tuttle, S. J.,	Lincoln
Vail, H. C.,	Albion
Van Dusen, J. H.,	Omaha
Vaughn, Fred W.,	Fremont
Wakeley, Eleazer,	Omaha
Wakeley, Arthur C.,	Omaha
Ware, John D.,	Omaha
Webster, John L.,	Omaha
Wells, P. A.,	Omaha
Westerfield, E. H.,	Omaha
West, J. W.,	Omaha
Whedon, C. O.,	Lincoln
White, B. T.,	Omaha
Wilcox, W. T.,	North Platte
Williams, T. F. A.,	Lincoln
Williams, R. O.,	Lincoln

Wilson, O.,	Lincoln
Wilson, H. H.,	Lincoln
Wood, W. W.,	Rushville
Woods, Frank H.,	Lincoln
Woolworth, J. M.,	Omaha
Wright, C. C.,	Omaha

PROCEEDINGS OF MEETING HELD JANUARY 22, 1900

A meeting of the lawyers of the State, for the purpose of reorganizing the old State Bar Association, or of organizing a new association, was held at the Federal Court room in Lincoln, on January 22, 1900, at 8:00 o'clock P.M., pursuant to a call issued to the members of the bar by Mr. C. O. Whedon, the last president of the old association. The meeting was called to order by Mr. Whedon, who was made chairman.

On motion of Mr. James H. McIntosh, of Omaha, Mr. Frank L. McCoy, of Omaha, was chosen secretary of the meeting.

On motion of Mr. Edmund M. Bartlett, of Omaha, that a list of all the members of the bar present be taken, he was appointed a committee for that purpose and took the names and addresses of the lawyers present as follows:

C. J. Greene,	Omaha
W. P. Hall,	Holdrege
F. G. Hamer,	Kearney
Ed P. Smith,	Omaha
J. A. Grimison,	Schuyler
G. W. Shields,	Omaha
Fred'k Shepherd,	Lincoln
N. D. Jackson,	Neligh
F. L. McCoy,	Omaha
W. W. Morsman,	Omaha
C. J. Phelps,	Schuyler
O. A. Abbott,	Grand Island
A. J. Sawyer,	Lincoln
E. Wakeley,	Omaha
R. W. Breckenridge,	Omaha
W. P. McCreary,	Hastings
C. C. Wright,	Omaha
E. H. Hinshaw,	Fairbury
F. H. Woods,	Lincoln
J. B. Barnes,	Norfolk

J. H. Van Dusen,	Omaha
J. B. Strode,	Lincoln
N. C. Abbott,	Lincoln
C. H. Roberts,	Holdrege
W. E. Reed,	Madison
J. W. West,	Omaha
C. P. Logan,	Grant
Will H. Thompson,	Omaha
C. O. Whedon,	Lincoln
E. M. Bartlett,	Omaha
M. B. Reese,	Lincoln
J. H. McIntosh,	Omaha
Frank Irvine,	Lincoln
I. E. Congdon,	Omaha
C. A. Robbins,	Lincoln
C. L. Richards,	Hebron
L. D. Holmes,	Omaha
G. E. Hager,	Lincoln
W. G. Hastings,	Wilber
S. P. Davidson,	Tecumseh
Roscoe Pound,	Lincoln

Thereupon, Mr. R. W. Breckenridge, in response to an invitation of the chair that he explain the purpose of the meeting, suggested that it would be wise and beneficial either to effect a reorganization of the old State Bar Association or to create a new organization of that character, with certain standing committees, upon much the same plan as the reorganized Omaha Bar Association.

Mr. F. G. Hamer next addressed the meeting in favor of reorganization, and suggested that one object should be to include as many of the lawyers of the State as possible. He moved that the chair appoint a committee of five on organization which should prepare a constitution and by-laws. The motion was seconded by Mr. W. G. Hastings.

Mr. S. P. Davidson addressed the meeting upon the question whether to reorganize the old association or organize an entirely new one, favoring the latter plan.

Mr. McIntosh thought it better to have a new organization and that the motion of Mr. Hamer ought to be withdrawn temporarily,

in order that it might be decided first whether to reorganize or form a new association. The motion of Mr. Hamer, with his consent, was withdrawn for the present.

Mr. C. J. Greene suggested that a new association be formed to be known as the Nebraska State Bar Association, with certain standing committees, and offered a resolution as follows:

"*Resolved,* That we, the members of the bar of the State of Nebraska, present at this meeting, do hereby constitute ourselves an association to be known as the Nebraska State Bar Association, the purpose and scope of which shall be similar to that of the bar associations of other states.

"That the officers of the Association be a president, vice-president, secretary, and treasurer, to be elected upon the adoption of this plan and to continue in office until their successors are elected and qualified.

"That there be a committee of six, one from each congressional district, upon membership, who shall pass upon applications for membership, including those present at this meeting, and admit or reject the applications of those present and such as shall apply until the organization is perfected.

"That a committee of five upon more perfect organization be appointed, who shall provide therefor along the lines indicated herein.

"That the admission fee be one dollar, to be credited upon such dues as may be required in the perfected plan."

Mr. Greene moved that the resolution be adopted, which motion was seconded by Mr. McIntosh. The resolution was discussed by Messrs. Hinshaw, McCreary, Irvine, and O. A. Abbott.

Mr. F. G. Hamer moved that the meeting vote on each proposition of the resolution separately, which was seconded.

Mr. Shields favored final action at once, making a permanent organization. He suggested that the resolution should specify the objects of the Association more clearly, and thought it ought to be formed more on the plan of labor and trade organizations, with a strong central power, with a subsidiary organization in each county or in each legislative district of the State. He moved an amendment to the resolution so as to provide for an organization which should have power to deal at once with any great emergency that the lawyers or the people of the State may have to meet.

Mr. J. B. Strode agreed with Mr. Shields.

Mr. Hastings believed also that this organization should be the central organization of the county associations.

The chairman held that Mr. Shields's amendment was out of order, and that Mr. Hamer's amendment was the first motion to be acted on.

Mr. Wright favored voting on the resolution as a whole.

The motion of Mr. Hamer was lost.

Mr. Bartlett suggested that the membership of the committees should be from each judicial district rather than from each congressional district.

The resolution of Mr. Greene was carried unanimously in the form above recorded.

Mr. Greene then moved that the meeting proceed to the election of officers of the Association in the order named in the resolution. The motion was seconded.

Mr. Woods moved an amendment that a committee of five be appointed to present nominees for the several offices, which motion was seconded.

Mr. McCreary opposed this last motion.

Mr. Strode moved an amendment to the amendment that the meeting proceed to elect officers by ballot.

The amendment to elect by ballot carried, and also the motion as so amended.

Mr. Reese moved that "the Nestor of the bar of this State," Judge E. Wakeley, of Omaha, be elected President of the Association, which was seconded by Mr. Irvine.

It was moved and seconded and carried that the Secretary cast the unanimous ballot of those present for Mr. Wakeley for President, which was done, and Mr. Wakeley was declared elected as the first President of the Association.

Mr. Reese was nominated for Vice-President, and the Secretary was instructed to cast the ballot of the meeting for him, which was done, and he was duly declared elected Vice-President of the Association.

On motion of Mr. McIntosh, Mr. W. P. McCreary was unanimously elected Secretary.

Mr. Davidson was nominated for Treasurer, and it was moved and carried that the Secretary cast the ballot of the meeting for

Mr. Davidson for Treasurer, which was done, and he was duly declared elected Treasurer.

Mr. Breckenridge moved that all committees named in the resolution heretofore adopted be appointed by the President, which motion was seconded by Mr. Irvine and was carried.

Mr. Irvine moved that when this meeting adjourn, it adjourn to such time and place as the President might name in a call for a meeting, which was carried.

Mr. Wakeley took the President's chair and addressed the meeting.

Whereupon the meeting adjourned.

After this meeting, pursuant to the authority conferred thereby, the President appointed the following committee on more perfect organization:

Mr. E. M. Bartlett, chairman; Mr. Roscoe Pound, Mr. Samuel P. Davidson, Mr. W. P. Hall, Mr. L. D. Holmes.

Also the following committee on membership:

Mr. A. J. Sawyer, chairman; Mr. C. J. Greene, Mr. C. J. Phelps, Mr. E. H. Hinshaw, Mr. Jno. M. Ragan, Mr. M. P. Kinkaid.

PROCEEDINGS OF MEETING HELD JUNE 18, 1900

Pursuant to call of the President, a meeting of the Nebraska State Bar Association was held in the Federal Court room, at Lincoln, on June 18, 1900, at 8:00 o'clock P.M.

The Committee on Membership reported favorably the following proposed members, whereupon the persons named were declared members of the Association.

First Congressional District

LINCOLN

R. J. Greene
Roscoe Pound
E. F. Pettis
J. H. Broady
W. T. Stevens
J. H. Ames
O. Wilson
A. J. Sawyer
S. L. Geisthardt
A. R. Talbot
F. H. Woods
R. E. Moore
F. Shepherd
J. B. Strode
N. C. Abbott
C. O. Whedon
M. B. Reese
Frank Irvine
C. A. Robbins
C. E. Hager
G. M. Lambertson
W. B. Price
W. B. Comstock
D. J. Flaherty
H. H. Wilson

PLATTSMOUTH

Matt Gering
D. A. Dwyer
C. A. Rawls
Byron Clark

NEBRASKA CITY

J. A. Rooney
C. W. Seymour

TECUMSEH

Hugh LaMaster
S. P. Davidson

AUBURN

B. F. Neal

WEEPING WATER

C. A. Tefft

SECOND CONGRESSIONAL DISTRICT

OMAHA

C. S. Montgomery
J. B. Sheean
V. O. Strickler
J. C. Cowin
T. D. Crane
B. T. White
J. M. Woolworth
E. C. Page
J. W. Hamilton
M. L. Learned
C. E. Clapp
O. P. M. Brown
W. D. McHugh
C. W. Haller
H. E. Maxwell
W. H. Thompson
C. W. Delamatre
G. W. Shields
C. F. Manderson
M. A. Hall
H. Kennedy, Jr.
F. A. Brogan
I. F. Baxter
W. R. Kelley
E. T. Farnsworth
C. J. Greene
E. P. Smith
F. L. McCoy
W. W. Morsman
E. Wakeley
J. W. West
E. M. Bartlett
J. H. McIntosh
I. E. Congdon
L. D. Holmes
R. W. Breckenridge
C. C. Wright
J. H. VanDusen
E. E. Thomas
E. W. Simeral
W. A. Redick
B. G. Burbank

THIRD CONGRESSIONAL DISTRICT

SCHUYLER

G. H. Thomas
J. A. Grimison
C. J. Phelps

WAKEFIELD

J. H. Brown

WAYNE

F. Fuller
F. W. Burdick

STANTON

A. A. Kearney
J. W. Mackey

EMERSON

W. A. Martin

FREMONT

G. L. Loomis

ALBION

Charles Riley

NORFOLK

W. M. Robertson
J. B. Barnes

OAKDALE

J. F. Boyd

COLUMBUS

C. J. Garlow

CREIGHTON

W. A. Meserve

NELIGH
N. D. Jackson

MADISON
W. E. Reed

Fourth Congressional District

CRETE
F. I. Foss
M. H. Fleming

GENEVA
F. B. Donisthorpe
R. J. Sloan
C. H. Sloan

YORK
S. H. Sedgwick
G. F. Corcoran
T. E. Bennett

BEATRICE
R. S. Bibb
Samuel Rinaker
L. W. Colby

WYMORE
A. D. McCandless

FAIRMONT
J. Barsby

HEBRON
T. C. Marshall
C. L. Richards

FAIRBURY
E. H. Hinshaw

WILBER
W. G. Hastings

AURORA
E. J. Hainer

SEWARD
J. J. Thomas

OSCEOLA
M. E. Bittner
E. L. King

Fifth Congressional District

HASTINGS
J. M. Ragan
M. A. Hartigan
C. E. Higginbotham
J. J. Buchanan
W. P. McCreary
W. F. Button
J. C. Stevens

IMPERIAL
C. W. Meeker

BLUE HILL
A. D. Ramsey

SUPERIOR
C. E. Adams

EDGAR
S. W. Christy

MINDEN
M. D. King
G. L. Godfrey

HARVARD
T. H. Matters

STOCKVILLE
L. H. Cheney

GRANT
C. P. Logan

HOLDREGE
C. H. Roberts
W. P. Hall

GRAND ISLAND
O. A. Abbott
W. S. Pearne
W. H. Thompson

SIXTH CONGRESSIONAL DISTRICT

KEARNEY
J. N. Dryden
W. S. Gaslin
F. G. Hamer

LOUP CITY
R. J. Nightingale
T. S. Nightingale

NORTH PLATTE
T. C. Patterson

BROKEN BOW
A. Morgan
C. L. Gutterson
W. Caldwell

CRAWFORD
J. B. Porter

COZAD
E. D. Owens

LEXINGTON
G. C. Gillan
E. A. Cook

HARRISON
G. Guthrie

ST. PAUL
J. N. Paul

O'NEILL
M. P. Kinkaid

GOTHENBURG
W. D. Griffin

ORD
A. M. Robbins
E. J. Clements

BARTLETT
A. L. Bishop

CHADRON
A. G. Fisher

Mr. Roscoe Pound, of the Committee on Organization, reported a draft constitution, which was adopted after some amendments in the form which appears on page 9.

It was then moved by Mr. McCoy that when we adjourn we adjourn to meet on the third Tuesday in September, 1900, at such place in Lincoln as the President might fix. The motion was carried.

Mr. Irvine then moved that the meeting proceed to elect *viva voce* three members of the Council, which was carried. The election resulted as follows:

A. J. Sawyer, for one year; R. W. Breckenridge, for two years; E. H. Hinshaw, for three years.

The Secretary, W. P. McCreary, presented his resignation to take effect July 1, 1900, which was accepted, and on motion Roscoe Pound was elected Secretary of the Association.

It was moved that all officers, except the members of the Council, should hold their offices until the next regular meeting of the Association. Carried.

On motion of Mr. Sawyer, the President was requested to appoint standing committees at once, as provided by the constitution.

Whereupon the meeting adjourned.

STANDING COMMITTEES, 1900.

Afterwards, on August 12, 1900, the President appointed the following standing committees to serve until the next annual meeting:

COMMITTEE ON LAW REFORM

A. J. Sawyer, Lincoln; L. W. Colby, Beatrice; W. P. McCreary, Hastings; E. M. Bartlett, Omaha; Matt Gering, Plattsmouth.

COMMITTEE ON JUDICIAL ADMINISTRATION AND REMEDIAL PROCEDURE

W. G. Hastings, Wilber; S. P. Davidson, Tecumseh; J. B. Barnes, Norfolk; R. W. Breckenridge, Omaha; W. P. Hall, Holdrege.

COMMITTEE ON LEGAL EDUCATION

M. B. Reese, Lincoln; J. H. McIntosh, Omaha; C. J. Phelps, Schuyler; O. A. Abbott, Grand Island; E. H. Hinshaw, Fairbury.

COMMITTEE ON LEGISLATION AFFECTING THE PROFESSION

Frank Irvine, Lincoln; J. M. Ragan, Hastings; W. D. McHugh, Omaha; M. P. Kinkaid, O'Neill; W. H. Thompson, Grand Island; G. M. Lambertson, Lincoln; Ed P. Smith, Omaha.

PROCEEDINGS OF MEETING HELD SEPTEMBER 18, 1900

The meeting was called to order by the President in Representative Hall at the State Capitol, in Lincoln, at 2:00 P.M. The Council reported favorably upon the names of the following applicants for membership:

J. N. Baldwin, Council Bluffs; C. L. Dundey, Omaha; S. A. Searle, Omaha; E. O. Kretsinger, Beatrice; H. D. Landis, Seward; W. D. Oldham, Kearney; S. J. Tuttle, John M. Stewart, T. F. A. Williams, L. C. Burr, E. C. Strode, A. G. Greenlee, A. E. Harvey, Lincoln; H. M. Mathew, Loup City; P. J. Cosgrave, Lincoln; I. L. Albert, Columbus; W. A. McAllister, Columbus; A. S. Tibbets, Lincoln; C. B. Letton, Fairbury; E. E. Hairgrove, Sutton; E. F. Gray, Fremont; Ira D. Marston, Kearney; John B. Raper, Pawnee City; J. J. O'Conner, W. S. Strawn, J. W. Battin, John L. Webster, Martin Langdon, Geo. E. Pritchett, W. D. McHugh, Omaha; C. C. Flansburg, R. O. Williams, Wilbur F. Bryant, E. W. Brown, Lincoln; E. R. Duffie, Omaha.

No vote being demanded as to any of these names, they were approved and declared elected.

The President addressed the meeting, briefly stating the object thereof, after which the Committee on Law Reform reported orally through Mr. Sawyer, the Committee on Judicial Administration and Remedial Procedure orally through Mr. Breckenridge, the Committee on Legal Education in writing through Mr. Reese (see Appendix), and the Committee on Legislation Affecting the Profession orally through Mr. Irvine and Mr. E. P. Smith.

Mr. Simeral moved that the Committee on Legislation Affecting the Profession be instructed to prepare a bill for immediate relief of the Supreme Court. Mr. McIntosh moved to amend by creating a committee of five to draft a bill for the appointment of a commission of nine persons learned in the law for the relief of the Supreme Court, making such provisions for cooperation between the commission and the Court as in their discretion might be practicable.

The proposed amendment was discussed by Mr. Hamer, Mr. C. C. Wright, Mr. McIntosh, Mr. Brogan, and Mr. Strawn. Mr. Whedon moved as a substitute that the several committees put their several recommendations in the form of bills, and that prior to the next meeting the Secretary furnish each member with a printed copy of each bill, to be discussed at the regular meeting. This was seconded by Mr. Montgomery.

The substitute motion was discussed by Mr. Montgomery, Mr. Strode, and Mr. Whedon. Mr. Simeral, with the consent of Mr. Hinshaw, who had seconded his motion, withdrew it, and Mr. Whedon's substitute was carried.

Mr. Martin, having been invited so to do by the Council, spoke on the general subject of relief of the Supreme Court.

Mr. Woolworth spoke briefly on the same subject by invitation.

Mr. Montgomery then spoke on the matter of proper celebration of John Marshall day. On motion of Mr. Bartlett, the Council was directed to take such steps as might seem best for proper celebration of the day and to procure an orator if possible.

On motion of Judge Letton the dinner was set for 10:00 o'clock.

Adjourned.

An informal dinner was had in the evening at the Lindell Hotel. Forty members were present. (See Appendix.)

On October 2, 1900, the Council fixed the date and place of the next meeting as January 2, 1901, at Lincoln.

On December 11, 1900, Mr. Irvine having resigned from the Committee on Legislation Affecting the Profession, the President appointed L. D. Holmes, Esq., of Omaha, a member of the committee to fill the vacancy, and also appointed Hon. W. D. McHugh, an additional member of such committee, to be chairman thereof.

PROCEEDINGS OF FIRST ANNUAL MEETING

JANUARY 2, 1901.

The meeting was called to order by the President in the Supreme Court room in the Capitol at Lincoln. The minutes of the meeting of September 18 were read and approved. The Council recommended the following persons for membership and, there being no objection, they were elected under the provisions of the constitution: G. Norberg, Holdrege; W. F. Gurley, Omaha; A. R. Olson, Wisner; D. A. Campbell, Lincoln; A. N. Sullivan, Plattsmouth; O. E. Martin, Wakefield; A. N. Ferguson, Omaha; C. N. Powell, Omaha; R. R. Horth, Grand Island; R. C. Glanville, Grand Island; Norris Brown, Kearney; H. M. Sinclair, Kearney; L. H. Blackledge, Red Cloud; Fred W. Vaughn, Fremont; H. C. Vail, Albion; W. M. Morning, Lincoln; J. N. Kilian, Columbus; W. H. Hayward, Nebraska City; John A. Ehrhardt, Stanton; and F. M. Hall, Lincoln.

Thereupon the President read his address. (See Appendix.)

On motion of Mr. Whedon the Secretary was directed to print the address and distribute it to the members of the Association.

Mr. Sawyer reported several proposed bills for the Committee on Law Reform. Mr. Breckenridge did the same for the Committee on Judicial Administration and Remedial Procedure. Mr. McHugh, for the Committee on Legislation Affecting the Profession, reported a proposed bill for the relief of the Supreme Court. Each bill proposed had been printed prior to the meeting, and copies were distributed.

Two proposed bills for the appointment of a Supreme Court Commission having been recommended, the one by Mr. Sawyer's committee and the other by Mr. McHugh's committee, Mr. Gering moved that the bill reported by Mr. Sawyer's committee be adopted as the bill approved and recommended by the Association.

Mr. Robbins moved as a substitute that a vote be taken on the following three propositions: (1) Whether the Association recommend the appointment of commissioners or referees; (2) if so, how many; (3) what name should be given them—which was

carried. The first question was then put and carried unanimously. Upon the second question, Mr. Robbins moved to recommend six commissioners. Mr. Breckenridge moved to amend by substituting nine for six. Mr. McHugh, Mr. Robbins, and Mr. McCandless addressed the Association with respect to this motion, and a communication from the Omaha Bar Association upon the subject was read by the Secretary.

Mr. Breckenridge's amendment was adopted, and the motion as amended carried.

Upon the question whether to recommend commissioners or referees, Mr. Davidson, Mr. Simeral, Mr. Breckenridge, and Mr. Gering addressed the Association.

On motion of Mr. Gering a standing vote was taken upon this question, at which 27 voted for commissioners and 17 for referees.

Mr. Matters moved that all political qualifications be omitted from any proposed bill, which was seconded by Mr. Simeral and carried.

Mr. Greenlee moved that the Association approve the provision of the bill recommended by Mr. Sawyer's committee, prohibiting the proposed commissioners from practicing during their terms of office, which was adopted.

On motion of Mr. Loomis, seconded by Mr. Gaslin, the provisions of the proposed bill, with reference to the qualifications of commissioners, were altered by providing that they have the qualifications of judges of the Supreme Court.

Mr. Wright moved that the several propositions adopted be incorporated in the bill proposed by Mr. McHugh's committee, and that the bill so amended be approved and recommended by the Association, which was seconded by Mr. Searle and carried.

On motion of Mr. Reese, the bill was recommitted to Mr. McHugh's committee to be redrawn.

On motion of Mr. McHugh, seconded by Mr. Strawn, the bill recommended by Mr. Hastings' committee, with reference to the writing of opinions by judges of the Supreme Court, was taken up for consideration. The proposed bill was discussed by Mr. Reese and Mr. Strawn and was recommended by a vote of 20 ayes and 13 noes. (See Report of Committee on Legislation in Appendix.)

On motion of Mr. Reese, seconded by Mr. Strawn, the Secretary was directed to furnish copies of the President's address, when printed, to the members of the legislature.

On motion of Mr. Strawn, the proposed bill as to the time of taking error proceedings was brought up for consideration.

Mr. Matters spoke in opposition.

Mr. Hartigan moved to amend by fixing the time for taking appeal and error at six months from the adjournment of the term at which the judgment was rendered, which motion was seconded by Mr. Matters. Upon this subject Mr. Breckenridge, Mr. Hartigan, and Mr. Loomis addressed the Association. The amendment was defeated.

Mr. Loomis then moved to refer the matter to the Committee on Legislation, instructing them to draft a bill reducing the time of taking error proceedings to six months from the date of the judgment, which was carried.

Mr. Foss moved to instruct the committee to draw a bill fixing the return day of summons in error at thirty days from the filing of the transcript, which was seconded by Mr. Searle and carried.

Mr. Wright moved that the bill recommended by Mr. Hastings's committee, with reference to the provisions of supersedeas bonds, be approved and recommended to the legislature. (See Report of Committee on Legislation in Appendix.)

Mr. Greenlee, Mr. Whedon, Mr. Strawn, Mr. Morning, Mr. Hartigan, and Mr. Robbins spoke upon this question. The motion was carried.

Mr. Strawn moved that a bill be recommended enabling the Supreme Court to pass on pending causes in such order as it deemed most advisable, which motion was seconded by Mr. McHugh.

Mr. Whedon and Mr. Matters spoke in opposition.

The motion was defeated.

Mr. Strawn moved to adopt a bill reported by Mr. McHugh's committee, providing for the permanent relief of the Supreme Court.

Mr. Whedon moved to amend by recommending a salary of $5,000.

Mr. McHugh moved as a substitute for this that all provisions for salary be stricken out and in their place a provision be inserted that the judges have such salary as the legislature might fix. Upon this subject Mr. Whedon, Mr. Byron Clark, and Judge Letton addressed the Association.

Mr. McHugh's amendment was agreed to.

Mr. Loomis, Mr. Robbins, Mr. C. L. Richards, and Mr. Davidson addressed the Association upon the substitute for Mr. Whedon's amendment, and the amendment as substituted was adopted.

Mr. Strawn's motion then coming up, Mr. Loomis addressed the Association with reference thereto, and it was carried.

Mr. Davidson moved that the legislature be asked to submit a constitutional amendment to the people fixing the salary of district judges and judges of the Supreme Court at $3,500.

Mr. Whedon moved to amend by changing the salary of the judges of the Supreme Court to $5,000.

Upon this subject Mr. Wright, Mr. Matters, Mr. Davidson, and Mr. Robbins addressed the Association.

On motion of Mr. Robbins, the whole matter was laid on the table.

Mr. Breckenridge, on behalf of the Council, submitted the following nominations for officers for the ensuing year: For President, W. D. McHugh; for Vice-Presidents, Francis Martin, A. D. McCandless, and O. A. Abbott; for Secretary, Roscoe Pound; for Treasurer, S. L. Geisthardt. On motion of Mr. Whedon, the report was adopted and the President cast the unanimous ballot of the Association for the officers nominated. Afterwards, on motion of Mr. Breckenridge, Mr. Sawyer was unanimously reelected a member of the Council.

On motion of Mr. Wright, seconded by Mr. Sawyer, all further recommendations of the several committees were referred to a committee of five to be appointed by the President for the purpose of drawing bills and presenting them to the legislature.

Whereupon the Association adjourned.

Afterwards the President appointed a special Committee on Legislation as follows:

R. W. Breckenridge, Norris Brown, W. G. Hastings, Ed P. Smith, C. L. Richards.

The Council appointed January 9, 10, 1902, at Omaha, as the time and place of the next meeting.

PROCEEDINGS OF THE SECOND ANNUAL MEETING

JANUARY 9, 1902.

The meeting was called to order by the President at 3:00 P.M. on January 9, 1902, in Court Room Number 1, in the Court House at Omaha. One hundred and eighteen members were present.

The President, Mr. Wm. D. McHugh, read his address. (See Appendix.)

Mr. McIntosh thereupon offered the following resolution:

"*Resolved,* That the Nebraska State Bar Association has heard with deep interest the annual address of its President, and cordially approves the sentiments expressed therein, but especially commends and endorses that portion disapproving of the common practice on the part of the judges of our courts of participating in party politics."

A motion to adopt this resolution was seconded by Mr. Davidson and was carried unanimously.

The special Committee on Legislation presented a written report (see Appendix), which, on motion of Mr. Woolworth, was received and placed on file.

The minutes of the preceding annual meeting were read and approved.

Messrs. McIntosh and Strickler were appointed Auditing Committee to pass on the report of the Treasurer, and thereafter reported, approving it in all things.

Messrs. Wright, Gurley, and Davidson were appointed Committee on Resolutions upon the death of Judge Powell and Mr. Strawn.

Mr. Wright offered the following resolution:

"*Resolved,* That it is the sense of this Association that all the opinions of the Supreme Court and of the Supreme Court Commissioners should be published, and we hereby earnestly request the court to authorize the publication of all such opinions, including those heretofore rendered but not yet published."

A motion to adopt this resolution was seconded by Mr. Burbank.

Messrs. Hamer, Breckenridge, McPheeley, and Breen spoke favoring the resolution. It was carried unanimously.

Mr. Elgutter moved that the President appoint a committee of five to present the resolution to the Supreme Court, which was carried.

At 5:30 an adjournment was taken until 8:15 P.M.

At 8:15 P.M. Mr. John L. Webster delivered an address before the Association and the general public entitled "Some Phases of the Declaration of Independence." (See Appendix.)

Mr. C. L. Richards moved that the address be printed, which motion was seconded by Mr. Kelligar and carried.

Mr. Switzler moved that thanks of the Association be tendered to Mr. Webster for his admirable address, which motion was seconded by Mr. Searle. Carried.

An adjournment was then taken until 10:00 o'clock of the following day.

JANUARY 10, 1902.

The meeting was called to order at 10:00 o'clock by the President. Eighty-five members were present.

Mr. C. C. Wright read a paper entitled Irrigation. (See Appendix.)

Mr. Commissioner Hastings read a paper entitled The Lawyer and His Jury. (See Appendix.)

On motion of Mr. Hastings, seconded by Mr. Foss, Mr. F. G. Hamer was requested to speak on the subject of Irrigation, which he did for fifteen minutes.

The Council recommended the following members of the bar for membership in the Association:

C. Patterson, Rushville; R. W. Patrick, Omaha; D. L. Johnson, J. H. Macomber, H. C. Brome, A. H. Burnett, J. P. English, T. J. Mahoney, Frank Crawford, Chas. G. McDonald, E. H. Scott, Howard B. Smith, Wm. W. Keysor, John D. Ware, Omaha; H. M. Grimes, North Platte; A. M. Morrissey, Valentine.

They were duly elected.

At 12:15 a recess was taken until 2:30 P.M.

At 2:30 P.M. the meeting reconvened. Sixty-two members were present.

The Council recommended for membership W. W. Slabaugh, A. C. Wakeley, and E. H. Westerfield, of Omaha, and B. V. Kohout, of Crete, who were elected.

Mr. F. A. Brogan read a paper entitled The Making of Laws. (See Appendix.)

Mr. Calkins read a paper entitled Some Suggestions for Reform in State Finance. (See Appendix.)

Mr. Commissioner Pound read a paper entitled The Decadence of Equity. (See Appendix.)

The Committee on Resolutions reported the following:

"WHEREAS, In the Providence of God, Hon. Clinton N. Powell and Winfield S. Strawn, Esq., members of this Association, have departed this life since our last meeting, and,

"WHEREAS, In their lives they were eminent in their profession, and by their earnest and conscientious labors at the bar and on the bench adorned the profession of law; be it

"*Resolved,* That the example of their lives and labors is worthy of emulation, and that in their deaths the bar of the State has sustained a serious loss; that this Association hereby extends to the wives and families of the deceased its sympathy in their bereavement.

"C. C. WRIGHT,
"W. F. GURLEY,
"S. P. DAVIDSON,
"*Committee.*"

On motion of Mr. Wright, the resolutions were adopted.

The President announced that he would not appoint a committee to present the resolution as to publication of opinions to the Supreme Court, for the reason that he had been informed that the rule as to publication had been changed.

The Executive Council made the following nominations of officers for the coming year:

PRESIDENT—Samuel P. Davidson, Tecumseh.

VICE-PRESIDENTS—W. H. Kelligar, Auburn; A. W. Crites, Chadron; W. T. Wilcox, North Platte.

SECRETARY—Roscoe Pound, Lincoln.

TREASURER—Charles A. Goss, Omaha.

On motion of Mr. Foss, the report was adopted and the President cast the unanimous ballot of the Association for the persons named.

On motion of Mr. Davidson, Mr. R. W. Breckenridge, of Omaha, was unanimously reelected a member of the Council.

Mr. Switzler moved to request the Council to publish the whole of the proceedings of the Association as soon as funds would allow. The motion was carried.

On motion of Mr. Wright, the thanks of the Association were extended to the county commissioners of Douglas county for the use of rooms in the Court House for the meeting.

The Association adjourned *sine die* at 4:20 P.M.

At 6:30 P.M. a banquet was held at the Iler Grand Hotel, at which 105 members were present. Mr. R. W. Breckenridge presided. Responses were made as follows:

"The Bench," Hon. W. W. Keysor.

"The Tree Planters' State" (see sec. 1, art. 14, chap. 83, Comp. Stat.), Mr. C. F. Reavis.

"The Necessity for a New Constitution," Mr. T. J. Mahoney.

"Our Clients," Mr. Norris Brown.

"The Bar," Mr. W. F. Gurley.

STANDING COMMITTEES, 1902

On June 21, 1902, the President appointed the following standing committees:

LEGISLATION AFFECTING THE PROFESSION

R. W. Breckenridge,	Omaha
C. L. Richards,	Hebron
C. F. Reavis,	Falls City
J. H. McIntosh,	Omaha
Norris Brown,	Kearney

LEGAL EDUCATION

H. H. Wilson,	Lincoln
O. A. Abbott,	Grand Island
C. C. Wright,	Omaha
N. D. Jackson,	Neligh
W. T. Wilcox,	North Platte

LAW REFORM

W. D. McHugh,	Omaha
J. M. Ragan,	Hastings
A. J. Sawyer,	Lincoln
W. H. Kelligar,	Auburn
R. E. Evans,	Dakota City

JUDICIAL ADMINISTRATION

C. B. Letton,	Fairbury
W. W. Keysor,	Omaha

E. P. Holmes,	Lincoln
B. F. Good,	Wahoo
H. M. Grimes,	North Platte

On September 1, 1902, Hon. W. W. Keysor resigned, and Hon. I. F. Baxter, of Omaha, was appointed in his stead.

APPENDIX

THE IMPORTANCE OF A PATRIOTIC AND COMPETENT BAR

[Remarks by Dr. E. B. Andrews, Chancellor of the State University, at the dinner, September 18, 1900]

It is customary to laugh at lawyers, and none know better than lawyers themselves why this is so. There are incompetent lawyers and there are dishonest lawyers. Such deserve ridicule and condemnation. But dislike for black sheep should not lead you to disuse mutton or wool. It is idle to select this or that as the most useful profession in modern society, where all the professions are indispensable, lawyers with the rest. It is also vain to speculate on the possibility of dispensing with lawyers in a different or much more highly developed society. The society that is must have them, and no social evolution now in sight will enable us to get on without them.

Trained legal intelligence is necessary in great abundance in order that good laws instead of bad ones may be placed on the statute books. Men complain of overmuch litigation, the difficulty of securing justice through the courts, and the complaint is just. But they ought to lay the main blame not on the legal profession, but on the absence of legal talent in the legislature where the laws are made. Few greater public evils now exist than clumsily made laws, inviting litigation. It was a sane move on the part of David B. Hill when governor of New York to have a legal expert go through each act passed by the legislature to see if it was clear in itself and congruent with laws already passed, vetoing as litigation-breeders all acts which did not answer these tests, no matter how good their motives. I would not have lawyers entirely make up the legislature, but it should have a goodly proportion of them and they should be of the best.

A competent bar is equally important in the formation of a just public opinion and sentiment on momentous public matters which

turn on legal conceptions. Public questions of this sort are more and more numerous in our complex modern life, questions whose very purport and meaning are unclear save as expounded by legal minds. I instance government by injunction, as it is called, now so much discussed. If this innovation is necessary to public order, it should be tolerated; if it is a tyrannical device to which courts have been bought or brought by trusts and capitalists, it should be abated as a shameful evil. But whichever of these views is true the first thing needed is that we understand what is called government by injunction. Many, maybe, find this easy; but I do not. I am obliged to seek explanation from my legal friends. In the same way a great many political questions which the people have to decide are at bottom legal questions. We can not do justice by such save as opinion is guided and steadied by a great number of honest citizens learned in the law.

The importance, in any state, of a just and healthy judiciary is remarked by every writer on scientific politics or government, and certainly too much can not be said on such a topic. But it seems to me that a worthy judiciary is absolutely dependent on a worthy bar. Many, no doubt, suppose that judges, at least those of the higher courts, know all law, and never need consult books or be informed by counsel. Some would perhaps vote against a candidate for a judgeship who confessed that he had to study law, as the trustees of a Minnesota college discharged as incompetent a professor who studied beforehand the subjects he was to expound to his classes. But the greatest judges know the vanity of such an idea. They are aware of their shortcomings. No legal mind is so capacious as to have mastered all the law. The most learned judge I ever knew used often to say to his son, a young practitioner who liked to pump the old man to get legal information easily, "I can not answer that question; it is new to me; I must hear counsel upon it." The immense legal learning stored up in the United States reports and in the various state reports—how has it come there? It is not wholly—it is not mainly the product of judges' brains; it represents rather the ability, thought, study, acumen, and research of an immense multitude of lawyers, most of them quite unknown to fame. Your judiciary stands on the shoulders of your men of law. And, as legal systems grow and the life of man becomes more complex, this dependence must be more and more complete.

It is the boast of the American Republic that whatever corruption may have touched our legislatures and our executives, our judicial officers have nearly all been just, so far at least as concerned their intentions; that our judges could not be bought or frightened. But when there has been an exception to this golden rule, has it not always been the bar that has pointed out the renegade and hounded him into lasting dishonor? The public must depend on the bar to exercise when necessary this censorship over the bench. Laymen are incompetent to perform it rightly, and that the bar may do this the bar must be able, accomplished, and honest.

REPORT OF THE COMMITTEE ON LEGAL EDUCATION

SEPTEMBER 18, 1900

To the President and Members of the Nebraska State Bar Association:

Your Committee on Legal Education beg leave to submit the following report:

Pursuant to the call of the chairman, C. J. Phelps and James H. McIntosh of the committee met with him at the Lindell Hotel at 8:00 o'clock P.M. on the 17th day of September, 1900. Messrs. Abbott and Hinshaw were absent.

The committee, recognizing the need of a higher plane of legal education in this State, would submit the following suggestions:

While we recognize the fact that there are many excellent lawyers who have not had the benefit of a collegiate education, yet we believe that in view of the general high standard of popular education throughout the State, and the great number of liberally educated people, and the higher demands which are continually being made upon the legal profession, the time will soon have passed when any of our people can successfully engage in any of the learned professions without having previously received a degree of mental training which would be equivalent to the education which is usually acquired by what is known as a collegiate course. Mental development comes from mental training. Without such training and development it is quite difficult for one to fully receive and assimilate the principles of the law to an extent sufficient to enable him to apply them to the complicated affairs of life and thus render efficient service in the matter of the protection of rights and the redress of wrongs. While it is often difficult to decide as to the exact degree of previous mental training one should have in order to prepare him for the legal profession, yet we think steps should be taken at once looking to the advancement of educational attainments, as a condition precedent to admission to the bar.

Our State University is now proposing to so combine the courses of university training as to permit the academic student to give

the greater portion of his last year's work to the study of the law, and, while receiving his degree of bachelor of arts only, he will be entitled to a year's credit in the law course, which, when extended to three years, will leave but two years' work to be done. This, however, can not be accomplished until, by an act of the legislature, the time for office reading (as a necessary prerequisite to examination) shall be made the same. If a person is permitted to apply for examination and be admitted to the bar after studying law in the office of a practicing attorney for two years, it will remain impossible for the law school course to be extended to three, as this would be offering a premium for office-trained lawyers in preference to law school graduates.

Your committee is persuaded that there is no comparison between legitimate law school training and office study. In the former a methodical course of study is adopted and the foundation for future investigation is laid. To this is added the continuous, persistent study which is necessary to enable one to accomplish the work assigned. Then again the class quiz and discussion of topics studied must always be beneficial. Erroneous ideas will, inevitably, be formed. These are corrected before the lasting impression upon the mind is made by them—one of the best opportunities for this being the class quiz.

In the latter (office study) these opportunities are not had, and the erroneous impressions become fixed. The office study always becomes something of a drag, and much time is lost in attending to matters outside the lines of study and which are an inevitable detriment. Close application becomes tiresome, and much of what otherwise would be a pleasure and an efficient aid in study becomes a burden and a detriment.

In this connection we desire to call your attention to spurious but alleged law schools which have recently sprung up in this country—many of them without authority of law—which have no other mission but that of practicing a fraud upon unsuspecting and uninformed persons who desire to prepare for the practice of the profession. Of this class are the so-called "correspondence schools" and those whose principal mission it is to sell diplomas. We think the profession generally should discourage such enterprises and advise their younger and less informed friends to take their legal training in reputable schools whose certificates of work

done will be a recommendation and an honor instead of a positive injury in after life.

Summarizing this report, your committee recommend,

First—A higher general education as preliminary to the study of the law.

Second—An extension of the time to be devoted to the study of law to three years.

Third—That legitimate law school training be recommended in preference to office study.

Fourth—That attendance upon or spending money in spurious and irregular so-called law schools be at all times discouraged.

Respectfully submitted,

M. B. REESE, *Chairman.*
C. J. PHELPS.
J. H. MCINTOSH.
E. H. HINSHAW.

REPORT OF THE SPECIAL COMMITTEE ON LEGISLATION

JANUARY 9, 1902

To the President of the Nebraska State Bar Association:

SIR—The Committee on Legislation, appointed by the President of the Association to prepare and present to the legislature at its 1901 session certain measures recommended by this Association, reports as follows:

The most important action had was that with reference to the establishment of the present Supreme Court Commission, appointed pursuant to chap. 25 of the laws of 1901, which took effect March 19, 1901, and is to be found in the Compiled Statutes for 1901 as sections *22e* to *22k* inclusive of chap. 19, title Courts, Supreme and District. This measure was accorded hearty support, and was among the first of the bills introduced in the legislature of general interest which became a law.

Under the law as it stood prior to March 29, 1901, proceedings in error could be commenced at any time within twelve months after the rendition of the judgment sought to be reversed, whereas appeals in cases of equitable cognizance were required to be docketed in six months. There was no excuse for the allowance of a greater time to perfect proceedings in error than appeals, and a bill was prepared and introduced in the legislature which was passed, limiting the time for the commencement of proceedings in error to six months after the rendition of the judgment. This change in the law is found in sec. 592 of the Code of Civil Procedure.

Two or three measures of considerable importance failed of passage. Under sec. 584 of the Code of Civil Procedure, in any case docketed in the Supreme Court twenty days or more before the commencement of a term, the case will stand for hearing at that term, but if less than twenty days intervene, the cause can not be submitted except by consent of all parties until the second term after the docketing of the case, except in such cases as are brought before the court in the exercise of its original jurisdiction.

A bill was introduced fixing the return day of a summons in error at a certain time after the filing of the case, regardless of the commencement of the term; but the bill failed.

A bill was also introduced giving to the court the option to file written opinions or not as they chose in cases decided by them, except that in cases where a judgment was reversed a statement of the grounds of reversal was required to be made. The advocates of this measure foresaw that with twelve active members of the court a great number of opinions would be filed and a large amount of shelf room would be speedily occupied with the decisions of our court, unless some means was devised to avoid it. This measure likewise failed, but the court, whether in sympathy or not with the proposed change in the law, has adopted the practice of selecting from the opinions brought to it by the commission those which are to be officially reported.

By common consent one of the greatest abuses permitted by the present statutes of this State is the giving of waste bonds in mortgage foreclosures by which, pending an appeal to the Supreme Court, the mortgagor is left in possession of the premises with no restriction upon him except against carting off the buildings which may be upon the premises or burning them down. A bill was framed by your committee and introduced in the legislature providing that such bonds should cover the rental value of the premises pending the appeal, and providing for the same character of a bond as that required by sec. 588 of the Code of Civil Procedure in error proceedings in civil cases. This bill passed the house by a narrow margin, but was talked to death in the senate, and failed of passage because of political influences used to bring about its defeat. Your committee recommend that another attempt be made to amend the law in this regard so as to prevent the evils which continue possible by the giving of mere waste bonds in mortgage foreclosures.

Respectfully submitted,

R. W. BRECKENRIDGE.
NORRIS BROWN.
W. G. HASTINGS.
ED P. SMITH.
C. L. RICHARDS.
Committee on Legislation.

ADDRESSES

ADDRESS OF THE PRESIDENT, ELEAZER WAKELEY, OF OMAHA, AT THE FIRST ANNUAL MEETING

JANUARY 2, 1901

GENTLEMEN OF THE ASSOCIATION—As set forth in the preamble to its Articles of Association, this body was organized "for the advancement of the honor and dignity of our profession and encouragement of cordial intercourse among the members thereof."

It should be easy to select, within the scope of those objects, a suitable topic for the address which the President is directed to deliver at the regular meeting of the Association next succeeding his election. In the wide domain of the law, in these days of progress, advancement, and expansion in the pursuits and activities which engage mankind, and with which the law and the profession, if they are to fulfil their broad mission, should keep abreast, there are subjects and questions to invite attention and discussion, almost without limit. If the Association is to have the permanence and continued stability which are hoped for it, there will be many and fit opportunities in the future to dwell on abstract themes and theories and aspects of the law always interesting to its students and exponents.

But, in the judgment of your present presiding officer, there are existing facts and considerations of a practical character so pressing and of such public moment that, for the time, they demand your attention to the exclusion, if need be, of subjects more remotely bearing upon the interests, honor, and welfare of the profession. Using words which have, of late, been familiar, "it is a condition, not a theory, that confronts us"; and this body of practicing lawyers will have no difficulty in drawing the correct inference as to their application.

In sec. 13, of art. 1, of the Constitution of Nebraska—the Bill of Rights—it is written: "All courts shall be open, and every person,

for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." In these few words are embodied two great and vital principles of remedial law: First, that the citizen shall have a remedy for all wrongs to property, person, and reputation, not dependent upon the grace or favor of any officer or any department of the government, but demandable as an ordained right. In so providing, the framers of our State constitution recognized the imprescriptible right interwoven in the fabric of our government, and finally embodied in Amendment V of the Constitution of the United States, in that brief clause declaring that no person shall "be deprived of life, liberty, or property without due process of law." No American lawyer need be told how far-reaching and effective this provision has proved to be in the conservation and protection of private rights throughout our Union; and what a palladium of defense those few words have been, in cases innumerable, against reckless or inconsiderate legislation. Second, that "justice must be administered without denial or delay." It is not saying too much that, in the practical affairs of life and the exigencies which continually arise in the rush and hurry which characterize our American business, and even our home life, an undue delay of justice is, many times, as harmful and fatal as a denial of justice. Be that as it may, the people of this State, for whom its constitution was framed, have a right to require—not merely to ask, but to demand—that there shall be no ruinous or wrongful delay of justice which can be avoided; and when such delay exists they have a right to appeal to their representative, the honorable the legislature of the State, to do whatsoever may be within its constitutional functions to remedy the evil.

That such a condition has been reached in the litigation of this State and such delay exists in a deplorable degree need not to be demonstrated to lawyers or litigants. It is everywhere conceded; and we are brought to the only debatable question—Is there an available remedy, and what is it?

First, as to the cause: Not many years since, in the flood of litigation, growing largely out of the phenomenal increase of population and business in the cities and rural counties of Nebraska during the decade preceding the years 1892 and 1893, the congested dockets of the district courts, especially in the larger centers of

business and commercial activity, called for the constitutional expedient of increasing by law "the number of judges of the district courts and the judicial districts of the State." The result was that, commencing in 1883 with the adding of a second judge in the third district, and increasing the number of districts from six to ten, it ended in 1889 with fifteen judicial districts, and twenty-eight judges—the present number.

It does not admit of doubt that, in the present state of litigation, the provision for district judges is ample for the due consideration and dispatch of all business in the trial courts of the State. There can now be no necessity for a hurried or unsatisfactory consideration of causes in those courts, or for indulging an ambition to be known as an expeditious "docket-clearer," resulting too often in a crude administration of justice, in needless wrong to litigants, and in exasperation to lawyers who have prepared their causes on the facts and the law with a research, completeness, and fidelity to their clients, and to their own reputation, that are entitled to the most deliberate attention which the time, industry, and patience of the court can accord. Not only that, but it may be a serious problem for the legislature and the bar of the State whether, before the next quadrennial election of district judges, it may not be expedient, on the score of economy and convenience to parties and their attorneys, that there be a new arrangement of districts, decreasing the number and the allotment of judges thereof. As at present organized, we know that, with rare exceptions, a case can be commenced, prepared for trial and hearing, and finally determined in the district court with reasonable dispatch—often in the first, and seldom later than in the second term after its commencement. Experience in this and in other states has shown that, ordinarily, such dispatch is all that is practicable and consistent with due preparation and full and patient hearing of the cause.

What, then, is the delay, its cause, and its remedy? I have referred to the constitutional injunction that there shall be neither denial nor delay of justice in the courts of Nebraska. But, without intending it, and from failing to fully forecast the future, the framers came near to nullifying this prescript by another provision, namely, that "the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied"; and, further, by a large grant of original jurisdiction, concurrent with that of the district courts.

Experienced lawyers in this State well know how potent these provisions have proved to be in flooding the Supreme Court with the appalling volume of business which in recent years has outrun its extreme capacity for labor and thought, and in bringing about the intolerable condition which, without the fault of its members, now exists in that tribunal. Passing over the statistics so thoroughly known to the bar, and all computation and speculation as to the future under the present disabilities, we have only to address ourselves to the immediate problem: What remedy is needed, and what remedy is, at present, attainable?

To deal radically and effectively with these organic defects, as I regard them, and make provision in other particulars against continued accumulation and delay could, in my judgment, be fully accomplished only through a general revision of the constitution. But the uncertainty and the necessary delay, under any circumstances, of reaching a result by that method make such a remedy wholly inadequate for the present, if not hopeless in the near future. We must therefore direct our inquiry and our efforts in the way of advice and suggestion to such legislation and methods as seem now available. In seeking these, I feel warranted in assuming that two main propositions are conceded and in the minds of the bar as the result of general discussion and interchange of views, namely:

That there must be an increase in the number of judges of the Supreme Court at the earliest time possible.

That, in the meantime, and awaiting such constitutional relief as may be had, the legislature, at its session now commencing, should do whatever is within its constitutional competency to promote the desired end.

As to first of these measures, two principal methods or plans have been suggested which, probably, will be thought most available for present exigencies, and are to be sought by the submission and adoption of amendments to the constitution through the action of the legislature. These are:

1. A single court, similar to the present, except as to the number of judges, to be composed of the whole number thereof, whatever it may be, sitting together for the hearing of causes.

2. A court divided into departments, each of which shall have jurisdiction to hear and determine causes under proper regulations as to labor and duties, but to sit *in banc* in such cases as may be deemed advisable.

Each of these would have its advantages; and there may well be different opinions as to which would be preferable and prove most satisfactory on trial. One fact, however, can not well be questioned—that is, that a given number of judges sitting in separate divisions or departments could hear more causes and dispatch more business than the same number sitting together *in banc*. It is obvious that a court composed of, say, five or six judges sitting together could hear no greater number of causes, on oral argument, than a court composed of but three, although there might be substantial gain in time and labor by distributing the causes for the writing of opinions and the detail work connected with their consideration.

To illustrate. While the presence and participation of the nine judges of the Supreme Court of the United States in the hearing of every cause aid in imparting the dignity which belongs to that great tribunal, and add weight to its decisions, whether unanimous or not, it is beyond doubt that, sitting in three divisions or departments, it could dispose, if not of three-fold the number, certainly of a greatly increased number of causes, and make corresponding progress upon its docket, still largely in arrears.

Without here entering upon a discussion of the subject, I am content to state, for whatever it may avail, my own view, rather as a member than as an officer of the Association. Under the existing conditions, and with the imperative need of doing now whatever is practically possible to lessen the paralyzing accumulation of business in the Court, I think a constitutional amendment should be submitted at the general election in 1902, increasing the number of judges of the Supreme Court to six, and dividing the Court into two departments, each composed of three judges, with equal jurisdiction, to sit separately, except in cases of necessity or of special importance, in which they should sit *in banc*. As between a single court of five judges and a department court of six, or even nine judges, the difference in expense to the State would be too small for serious consideration; and I can not think it would weigh at all with the intelligent citizens of Nebraska in whose interest, more than in the interest of the Court itself or of the bar, the measure would be proposed.

As to the intermediate relief which it will be in the power of the legislature to extend, pending proposed amendments to the consti-

tution, I am satisfied that the bar of the State, with, probably, few if any exceptions, and most thoughtful men who have considered the subject, would approve of and urge legislative action providing some measure similar to that creating the commission which expired about two years ago. The power of the legislature to provide such aid, in some form, can not well be doubted. Courts of record have inherent power, unless directly or indirectly prohibited by constitution or statute, and have long exercised the power to devolve upon designated officers or persons, such as general or special masters or referees, important powers and duties in the preliminary hearing of causes, and reporting to the court their conclusions of fact and of law, reserving to themselves and exercising the ultimate power of determining the cause upon their own responsibility and sense of judicial duty. It is of little moment whether such officers or persons be styled commissioners, masters, or referees, if their functions be properly limited as to ascertaining the facts and submitting their conclusions of law, with their reasons therefor, subject to revision, approval, or rejection by the constitutional majority of the Court. It is, indeed, the opinion of some excellent lawyers that the Supreme Court could, by rules, secure to itself such aid without legislative authority, if the necessary means to defray the expenses were appropriated. However that may be, it ought not to be doubted that the legislature, informed, as it must be, of the exigencies demanding it, will readily approve and enact into law some properly considered and formulated measure, not contrary to its own convictions of duty, if approved by the Court and by the general assent of the bar as represented by this Association. It must be borne in mind that, while such measures are ordinarily spoken of as measures "for the relief of the Court," they are in fact for the relief of litigants in the Court, who are guaranteed by the constitution ample and undelayed justice. It is for them, more than for the bar, or even for the Court, that constitutional revision or amendment and legislative aid are demanded.

I assume that the Association will regard it as a pressing duty at this meeting to consider, discuss, and recommend some suitable plan for attaining the objects in view; and, with this general reference to the needed remedies, the matter is committed to you for discussion and action.

Among the subjects within the cognizance of your Committee

on Legislation Affecting the Profession, or which, at least, should receive the serious attention of the Association, is that of amending the statutory provision as to supersedeas in certain cases of appeals in equity to the Supreme Court. Special reference is made to clause third of sec. 677 of the Code, providing for what is generally known as the "waste bond," under which the defeated party may retain possession of real estate adjudged or decreed to his adversary, during the long period of delay in the appellate court, without giving bond or security for compensation, or the value of the use and occupation of the premises in case of affirmance. That this works glaring injustice, and is a strong inducement to appeal for delay merely, is known to the entire bar and to all litigants who have had experience in such cases. The exemption and collection laws of the State are very favorable to the debtor. This has been the policy of the State from the beginning, and there is, probably, no general sentiment in favor of changing it. But the provision in question is not founded on any just leniency to the debtor class. It involves, rather, the question whether it is right to let one man enjoy another man's property without compensation or security. A judgment or decree directing the delivery of possession of real estate is a final determination, after a full and presumably a fair trial, that one of the parties is entitled thereto. Such judgment is presumed to be right until reversed or modified, and the least that should be required from the defeated party, while seeking a review, is that his adversary, if again successful in the Supreme Court, should be made good for his loss pending the appeal. No good reason can be suggested for the distinction that now exists between the conditions for supersedeas in cases going to the Supreme Court on error and those going there by appeal. In the identical case of a judgment which "directs a sale or delivery of possession of real property" proceedings in error do not operate as a supersedeas except upon an undertaking that, if the judgment be affirmed, the plaintiff in error will not only commit no waste on the premises, but "pay the value of the use and occupation of the property" pending the proceedings for review. That such an anomaly should be corrected seems too obvious to require extended discussion; and I recommend that the Association take measures looking to the abolition of the distinction. In this it will have, I can not doubt, the sanction of all fair-minded citizens who believe in even-handed justice to creditor and debtor, and between party and party.

Another change which would tend strongly to prevent proceedings intended only for delay would be to require causes in error, as well as appeals in equity, to be entered in the Supreme Court within six months, instead of within a year, from the rendition of the final judgment. No sensible reason can be given for the distinction, in this respect, between the two classes of cases. The perfecting of bills of exceptions containing the evidence and the obtaining of transcripts are the same, whether the cause goes up on error or appeal.

Among the matters properly within the purview and scope of the purposes of the Association is that of uniform legislation by the states upon some subjects of common interest and importance, which have no local aspects, and as to which there can be no good reason for divergence in local laws. Notably among these, as seriously affecting the interests and moral sentiment of the people, and appealing to citizens, whether lawyers or laymen, is the subject of divorce. This has, especially in recent years, engaged the attention of, and been much discussed by the profession and the community, and there is a very general conviction that the serious evils growing out of contrariety in the causes for divorce, and the effect of decrees therein, call for uniformity in divorce statutes and divorce proceedings in the several states—there being, of course, no federal jurisdiction to legislate in the matter.

Other subjects largely affecting the commercial and business interests of the people come within the general principle and present the same reasons for uniformity of legislation by the states. Without referring to these in detail, I can better commend them to your attention for such action, if any, as you may deem appropriate, by referring to the work of the "State Board of Commissioners for Promoting Uniformity of Legislation in the United States." In the report of the tenth national conference of that committee, held at Saratoga Springs, N. Y., in August last, in connection with the session of the American Bar Association, will be found a valuable and instructive history of its transactions during the last few years, with proposals and forms of bills for promoting uniformity in respect to several matters, especially divorce, the acknowledgment and execution of written instruments, the transfer of corporate stocks, the execution and probate of wills, the adoption of a uniform standard of weights and measures, and an elaborate scheme

covering the law of negotiable instruments in general. A copy of this work has been placed with the Secretary of the Association, and will be at your disposal if needed.

Other changes in the law in the interest of the profession and those whom the profession represents—litigants and the public—have, I presume, been considered by the proper committees, or may be in the minds of members of the Association for presentment and discussion. I have referred specially to those only which seem to me of importance and present urgency.

In view of contemplated legislation touching such matters as the Association may deem it advisable to place before the legislature, I suggest that a committee be constituted to represent the Association before it during the session, whose duty it shall be, so far as proper and practicable, to see that proposed measures are correctly understood and receive the intelligent consideration of the law-making body—such committee to be selected with due regard to convenience of attendance before committees, or where required in the discharge of its duties.

The importance of harmonizing your views and conclusions, so that your work may have the united approval and sanction of the Association, and be entitled to corresponding weight, is manifest. There will, of course, be differences of opinion as to the details, and probably as to the character of the measures to be recommended, but these should be subordinated to the main object in view.

Let me conclude with expressing the hope that this first session of the Association in the new-coming century may be a useful one, and be fruitful in the advancement of its declared purposes of promoting justice and maintaining and elevating the standard of the profession in our State.

ADDRESS OF THE PRESIDENT, WILLIAM D. McHUGH, OF OMAHA, AT THE SECOND ANNUAL MEETING

JANUARY 9, 1902

GENTLEMEN OF THE ASSOCIATION—The object this Association, as embodied in its Articles of Association is, among other things, "the advancement of the honor and dignity of our profession."

In the annual address which it is provided shall be made by the President, it is fitting that there shall be set forth the work already accomplished by the Association to attain the object of its creation, and that timely suggestion be made of the necessity and nature of the work yet to be done.

When this Association convened in its last annual session, we were confronted with a congestion of business upon the docket of our Supreme Court which so impeded the work of that tribunal as to justify the assertion that, within the boundaries of this State, justice was delayed, if not denied. To the relief of the people and the profession from this condition, the last session of this Association directed its efforts. A bill providing for the appointment of nine Supreme Court Commissioners was drafted by this Association, introduced into both houses of our state legislature, and, without amendment, was passed by the legislature and approved by the Governor. Promptly, upon the passage and approval of the act, the Court appointed nine commissioners who at once entered upon their duties.

The character, attainments, and qualifications of the gentlemen appointed to the commission were such that the bar and the people heartily endorsed their appointment, and the work of the Supreme Court has been greatly expedited; so much so, in fact, that there is reasonable assurance that, by the convening of the next legislature, the congested docket of the Court will have been relieved, and the Court will be at work upon the then current business. The expedient of providing a commission to aid the Court has been entirely successful, and the Association is to be congratulated upon

the fortunate outcome of its efforts to aid the Court in the despatch of its business.

The device of a Supreme Court Commission, however, is at best but a temporary expedient; the fact remains that the Supreme Court, constituted as it must be under our present constitution, is unable to so dispose of the causes before it as to keep abreast of the current business; and there is an immediate and pressing necessity for such a revision of our constitution as will enable us to secure a Court so constituted as to be able to dispose of the business before that tribunal as rapidly as the business is presented. The efforts of this Association to secure this needed constitutional change should in no wise be abated.

The Association at its last meeting drafted and approved various bills providing for needed changes in our procedure. All of these bills were introduced at the last session of the legislature, some being approved and passed and others failing of passage.

As our legislature will not be in regular session until the next meeting of this Association, it is not deemed necessary to discuss herein the measures which should be introduced to correct defects in our procedure which work to the obstruction or defeat of the administration of justice. Such a discussion will be more timely at our next meeting, which will be at the convening of the legislature in regular session.

There are, however, many things which concern "the honor and dignity of our profession" wherein there is room for much advancement and the remedy for which is not to be found in legislation. To some of these which appear to be of greatest importance I desire to call the serious and thoughtful attention of this Association.

There is small need in this presence to dwell upon the function of our profession and the responsibility resting upon its members. Every lawyer is an officer of the court; the bar as a whole is charged with a most serious responsibility in connection with the administration of justice. The judicial department of our government depends in a very large degree upon the members of our profession; as the lawyers of the state feel and act, so will the administration of the judicial department of our state government be. A defective condition in the administration of justice in our State, which can not find excuse in any established law, can rea-

sonably be charged either to some laxity of conduct on the part of the bar or to an indifference on its part to the duties devolving upon it. The lawyers are the guardians of our temple of justice, and, if they but do their duty fearlessly and well, the walls of that temple will never be defaced nor will its sacred altar fires ever grow dim. Therefore, with a due appreciation of the responsibility resting upon us as members of the legal profession, feeling the full force of the purpose of this Association to work for "the advancement of the honor and the dignity" of those concerned with the administration of justice, it is not only proper, but it is in obedience to the plain mandate of an imperative duty, that I speak of some things, which, prevalent in our State, seriously mar our judicial procedure, and which, unless checked, will work irreparable injury to our courts and our people.

First and foremost among these evils is the practice on the part of so many of our judges of taking a continuous, active, and prominent part in the politics of our State, both general and local. At the last state convention of one of the great parties of this State, the temporary chairman of that convention was a judge then upon the bench. The permanent chairman of that same convention was another judge then upon the bench. At the last State conventions of two other great parties, I am reliably informed by a participant, there were at least eleven judges then upon the bench attending those conventions, many of these judges heading their delegations, and all of them active and prominent in the partisan work of these conventions.

And we all know that, in local politics quite generally throughout this State, judges are active in party affairs, participating in the campaigns and constituting an efficient and potential force in the various factional and partisan contests.

Such is the fact. How deplorable all this is the lawyers of the State must fully realize. Every member of the profession whose appreciation of the true dignity of his work is at all adequate, and whose devotion to his profession is stronger than his partisan political ambition, must feel that this active participation of judges in partisan contests is in itself and in its effects and consequences a far-reaching evil.

The participation by judges in the councils and strifes of party politics must, to some extent at least, embarrass the judge in his

judicial functions. By allying himself, as he necessarily must when he takes part in the manipulations of local politics, with the schemers to whom politics is a business and whose ambition is personal gain or advancement, he necessarily, to some extent, mingles with them on their plane and becomes under obligations to them and their methods. To the mere politician, nothing is sacred. The highest office is to him merely an instrument of party. His mind and habits of thought are not such as to appreciate the true dignity or function of the judicial office; and he therefore demands that the judge as well as the sheriff or the mayor or other executive, legislative, or ministerial officer, shall hold his office as a reward of party and so conduct the office as to have in mind the necessities of the party and the opportunities of rewarding those most active in its behalf. The judge who mingles with these men, who identifies himself with these politicians, who works in the atmosphere surrounding the party caucus, is in great danger of imbibing some of this spirit and hence of looking upon himself and his office as a part of the machinery of a party, to be administered in accordance with the policies of the party councils. The judge who is to be true to the proper conception of his office; who is to know nothing about the parties but everything about the case before him; who is to do everything for justice and nothing for himself; who is to entertain in deciding the case no considerations except those flowing from legal principles and the evidence in the record, will certainly find nothing in the party caucus or in the city, county, congressional, or state conventions to strengthen him in his desire to be true to his ideal. For the man himself who is to fill the judicial office it is better that he abstain from all active participation in the manipulation of partisan affairs.

It need not be said in this presence that it is not intended by what has been said that every judge who participates actively in party affairs is influenced by party considerations in the performance of his official duties. We have in this State, upon every bench, judges independent, conscientious, and fearless, appreciating the true function of their office, yet who, through seeming necessity, allow themselves to be compelled to join in the work of party management and party campaigns. They do this, as was said, under compulsion, and their partisan activity is no part of their judicial spirit, and no partisan consideration in any wise consciously determines or modifies

their decisions. But it should also be said that the bar of this State, and they are the men who have the best opportunities of judging, do fear, if they do not believe, that we do have judges in this State whose active and continuous exertions in the manipulation of party affairs affect, if they do not determine, their action as judges.

Not only does participation in the manipulation of the machinery of parties and in the strifes of partisan politics affect the judge, but it necessarily brings the judicial office within the operation of party methods and the scheming party politician. The ward politician, working side by side with a judge upon the bench in party affairs, the designing party leader who, with a judge upon the bench, considers, determines upon, and works out factional or partisan schemes, inevitably is led to regard the judge and his office as a proper and powerful instrumentality for the working out of partisan politics. And he will grow to demand of the judge more and more of loyalty to the party, more and more of subserviency to the party need and the politicians' behest, until finally he will demand that decisions, in cases affecting party politics, be made so as best to serve the interests of the party which nominated the judge for the office. The evil of the practice not only affects the judge himself, but brings down upon the judge more and more of party pressure and makes the appeal of the party manager more and more difficult to resist.

Another, and in many respects a greater danger than those above mentioned inheres in the practice of the judge's active participation in party politics.

The office of judge is not only one of dignity, but it is one of power and of influence. Many men desire to cultivate the favor of a judge, and all men fear his ill-will. The position, therefore, affords to a designing politician very great opportunities. A man ambitious of political preferment, securing his nomination and election as judge, and then, while judge, actively engaging in the strife of party politics, bringing to the support of his contentions and his wishes all the power, prestige, and influence of his office, can so coerce men and work upon the fears of men that his will becomes most potential. His power as a politician is greatly increased by his position and opportunities as judge. The office of judge in his hands becomes a potent opportunity to advance his political ambitions. The duties and functions of his judicial office are perverted and prostituted to the necessities of his ambition as a politician. A

greater evil than this, in the administration of justice, can hardly be conceived.

It is a trite saying that our government is a government of laws and not of men. The administration of the law is all that holds this country together. Men enter into all manner of relationships, make contracts involving large interests and running for long periods, make loans and large investments upon their faith that, if the other party to these arrangements fails in his obligation, then the courts will be honest, fearless, and intelligent in granting them the relief which the law affords them in the premises. Unsettle this faith in the courts of this State, lead men to doubt the honesty, the fearlessness, or the impartiality of our judicial tribunals, and the character and reputation of our State will be low indeed, and men will of necessity curtail their enterprises here, and make their investments and do their business in some other commonwealth, the judiciary of which inspires the confidence so necessary to the transaction of business.

It is not only necessary in the administration of justice that our judges do give each man a full hearing and a fair trial, but it is also important that each man feel that he has had a full hearing and a fair trial. Anything, therefore, which will lead men to suspect that judges in their decisions are governed by ulterior motives and swayed by feelings not of a purely legal nature is almost as great an evil as a corruption of justice itself. We all know judges who are unfortunately active in politics, powerful and potential in factional and partisan contests, who, in sitting upon the bench, are entirely competent to do justice and to decide cases, even though they involve partisan interests, with a bold impartiality, neither consciously concerned with nor swayed by party considerations or necessities. But we all know, too, that the people generally, and litigants especially, have not this intimate knowledge of the judges and have not had the means which we have of appreciating the ability of the judge to separate himself when acting as a judge from all partisan considerations, and these people in bringing or defending suits before such judges, or reading the opinions and decisions of these judges, in all cases wherein party politics or party interests are concerned, are impressed, by reason of the judge's active participation in party affairs, with the belief that considerations of party necessity and welfare enter into and determine his course and decisions as judge.

Much more might be said to emphasize the evil effects of partisan activity on the part of the judges of our State. The lawyers of the State from their own experience and reflection can supply everything that has not been said.

It is entirely manifest that this serious condition of affairs, so generally prevalent throughout this State, affecting so vitally the administration of justice in this State, directly concerns the "advancement of the honor and dignity of our profession." It affects us because, as was said, we are officers of the courts. It affects us because, as was said, we are an important part in the administration of justice. The "honor and the dignity of our profession" require for their full development that our courts shall be untrammeled by politics, and that we, in common with all the people of the State, should know that judicial action is not affected by partisan considerations.

How are we to eradicate this evil? It is not a matter for the legislature. No legislative enactment can coerce a judge into a proper appreciation of his duties or into a due regard for his office. The only remedy and the efficient remedy is a healthy, sound sentiment on the part of the people and the bar, vigorous in expressing itself in the denunciation of the practice under consideration. If the bar of this State always voiced their disapproval of this practice, and on all occasions registered their earnest protest against its continuance, we would soon have a sound public sentiment, strong enough to compel obedience to it, and effective to deter all judges from mingling the ermine of their office with the foulness of ward politics.

No better work can be done by this Association, no more necessary work lies before this Association, than the upbuilding of such a public sentiment. If the members of this Association desire to carry out its avowed purpose and to work for the "advancement of the honor and dignity of our profession," let them commit themselves at once to a propaganda to arouse the conscience of the people and the judgment of our citizens against the practice of converting a judge into a politician.

It is to be regretted that our judges are selected through the machinery of parties. When we consider the methods of party politics, the considerations which move party conventions, and the character of the men most active in the manipulation of party affairs,

we can not but feel that there should be some better method provided by which our judges are to be selected. The recent action of our Executive with respect to a vacancy on the bench of the fourth judicial district may well be considered to point out the proper method of selection. A vacancy occurring in the office of judge in this, the most populous district in the State, the Governor requested the recommendation of the bar of the district as to the person to be appointed to the position. The members of the bar of the district met in convention and, acting entirely independent of any narrow party or partisan consideration, selected a gentleman in every way well qualified for the place and recommended his appointment. We have the assurance of the Executive that the appointment will be made. This action of Governor Savage in lifting the judgeship out of party politics is from every point of view to be commended as worthy of emulation.

The uncertainty of the law within this commonwealth is a subject deserving more than passing notice. The bar fully realize the necessity of stability in our legal system in order that lawyers may advise clients with respect to their rights. In this State we have, it is believed, too much of uncertainty and vacillation. Nebraska is a young State, and yet, in the decisions of our Supreme Court, there will be found one hundred and thirty cases decided by that tribunal which have been expressly overruled. In addition to these cases which have been in terms overruled, we have a large number of others which have been distinguished out of all semblance to their original tenor. The process of overruling is still going on, and every volume of Nebraska Reports contains some decisions overruling prior decisions of the Court.

It is not to be claimed that these overruled decisions were correct enunciations of the law. On the contrary, many, if not most of these cases were originally wrong in their expressions of the law, and the necessity of overruling them was pressing. But it is submitted that the tendency is now too strongly in the direction of overruling cases; that the practice has been so much indulged that the nature of such an action is not realized; and that the time has come when emphasis should be laid upon the evil effects of a too free indulgence in the power of overruling prior decisions.

This constant overruling of the decisions of the Supreme Court of this State introduces into our jurisprudence an element of chaos

which is a serious evil. Lawyers called upon to advise with respect to matters which involve large interests, and which will determine a course of conduct on the part of a business institution, feel unsafe in advising with respect to the law, even though a decision of our Supreme Court declare the law. There is a constant fear that, should the matter again be litigated, that eminent tribunal might modify the decision, or overrule it entirely, with disastrous consequences to the client who has acted upon the former decision.

Without discussing the value of the rule of *stare decisis* or its limitations, it has seemed that some considerations with respect to this phase of our judicial administration should be presented to and considered by this Association. It has seemed to me that the cause of the fluctuations in the decisions of our Supreme Court and the consequent shifting of our substantive law is deeper than appears at first glance, and that it is due to a long-established practice of the Court, not yet fully eradicated, which practice involves a radical departure from our theory of jurisprudence.

Throughout the history of this State we have had a doctrine, controlling in our highest Court, which is familiar to the bar of this State under the term "substantial justice." The theory of the doctrine is that cases should be decided by the Court solely according to the Court's conception of the abstract justice of the controversy. Under the influence of this theory, the Court has handed down decisions which the Court considered to do justice to the parties, although to make the decisions it was necessary to ignore some positive, established, legal principle. This doctrine has so long obtained in our Court and has been so frequently applied that its influence can not at once be thrown off, nor can the practice at once be eradicated; but, on all proper occasions, the profession should pronounce against the doctrine and aid in its speedy and complete abandonment.

The principle, as was stated, is at variance with the fundamental theory of our legal system.

It is familiar learning that in Greece, especially in the courts of Athens, concerning which we have definite information, cases were submitted and tried and decided, not upon any fixed legal principle, but upon the idea of the court and jury as to what decision would be most just between the parties. No one decision was a precedent for any other decision, with any controlling effect, and even writ-

ten laws were ignored when obedience to them would compel a decision which, in the mind of the trial court, would work injustice. Untrammeled by any precedent and unfettered by any positive controlling enactment, the courts at Athens decided each case according to the then prevailing idea in the mind of the court as to what would be exact justice between the parties. As the ideas of justice would vary from time to time, and even vary with the composition of the court to decide the case, it is evident that no one could, with any degree of correctness, forecast a decision of such a tribunal, or advise with any certainty of what its decision would be. Therefore, it was impossible that such a practice could build up any permanent law. And the Greek intellect, with all its brilliancy and activity, never developed any philosophy of law.

In Rome, however, a different condition prevailed. The Romans had a devotion for law as such. They established certain legal principles and gave them controlling force whenever circumstances called for their application. They recognized the necessity of having these legal principles control, even though a peculiar combination of circumstances might in some individual case make the application of these principles work an injustice; they saw that it was necessary to submit to an occasional judgment which might work injustice, in order that the general principles should not be undermined; and so, steadfastly adhering to these principles, modifying, harmonizing, and developing them as the nation grew into a wider and truer conception of the rights and duties of men, the Romans built up their magnificent legal system.

In like manner, our system of common law was builded; the courts go to the decisions for the legal principles and apply the principles to the case in hand.

The doctrine of "substantial justice," of making every decision meet the conception of the court as to what is abstract justice between the parties, is, therefore, fundamentally at war with the theory upon which our jurisprudence is founded. If our courts are to be true to our system of law, they will apply the doctrines of the law unimpaired to the decision of every case to which the doctrines apply.

When this is done, and continually done, then the lawyer may advise his client with respect to a course of business or a particular transaction with assurance and with safety, knowing that, if he cor-

rectly interpret and apply the legal principles in his advice, it will be justified by the Court when the matter comes before it, since that tribunal will interpret and apply those same principles to the same facts.

Our highest courts in deciding cases not only make decisions of the controversies between the parties to the litigation, but they are also continually making a jurisprudence for the State. From the decisions of our courts, we must deduce the legal principles constituting our substantive law. If our courts are to twist or ignore established legal doctrines to meet a supposed equity of a particular cause, it will be in vain for the profession to search their decisions for legal principles; and, instead of a jurisprudence based upon established legal principles, we will have our law builded upon foundations as uncertain as the shifting sands, and the benefits of a settled system of laws will be denied to our people.

The first meeting of our Association, as was said, was devoted entirely to the procurement of legislation for the relief from evils so great as to make their removal the most pressing necessity before this bar. This, our second meeting, however, is to be devoted to a consideration of questions of a general nature, all bearing upon the work of our profession.

It is needful that our pride in our work be maintained; that we realize that the practice of the law is not a trade, but a profession which places upon its members a responsibility beyond the special engagements of their practice, and charges them with a duty toward the science of jurisprudence and the administration of justice. Meetings such as this should serve to kindle our professional spirit and at once make us perceive and perform our full duty as members of the legal profession.

In conclusion, let me hope that this meeting will be but the beginning of a long series, each one contributing largely to the upbuilding of the professional spirit among the bar of this State, and all of them productive of much good.

SOME PHASES OF THE DECLARATION OF INDEPENDENCE

ADDRESS OF JOHN L. WEBSTER BEFORE THE SECOND ANNUAL MEETING, JANUARY 9, 1902

MR. PRESIDENT AND GENTLEMEN OF THE NEBRASKA BAR ASSOCIATION—No lawyer who aspires to eminence in his profession can afford to neglect the study of our national history. No matter how well he may be schooled in the civil law of the Romans and in the common law of England, he can not become an eminent American lawyer until he learns thoroughly how much these have been changed and modified by the fundamental principles of our government. Our national life and republican institutions have created for us a law unto our own people. Lords Mansfield and Eldon, if living in these days, could not successfully practice law in America without tempering much of their vast storehouse of knowledge with the principles of a broader humanity, and softening the rigors of monarchical rights and obligations by the simpler duties and privileges of a free people. American law has grown up with the American institutions. It may be said to be a garden of flowers planted and cultivated by American hands, and nourished by the best American thought, and watered by American history.

In the selection of the subject for this discourse, I may not be able to say anything that is not already familiar to almost all of you, but if by my remarks I can excite a laudable ambition to refresh your minds anew with the incidents of American history and the study of the foundations upon which it is builded, I will have accomplished something for the benefit of the profession to which we belong. No other profession is so closely allied with the science of government and no other profession is so dependent for success upon the higher ideals of perfection.

A look into the Colonial Congress, from its opening in September, 1774, to the memorable day when it adopted the charter of American liberty, and a casual study of the strong spirits and controlling characters that worked out the different steps of its ad-

vancing progress, from a mere advisory assembly to the separate colonies, and a protesting body against unjust legislation of Great Britain, to the time when it assumed the character of a national legislative Congress, should have a special interest to the lawyer. The chief culminating work of its labors, like all the lasting and profound bulwarks of our republican institutions, was brought forth by men who had been trained in the study of the law. Such men as John Adams, Roger Sherman, George Wythe, Stephen Hopkins, Richard Stockton, Edward Treat Paine, Samuel Chase, Thomas McKean, and Thomas Jefferson are but a limited number of the galaxy of names in that body that stood highest in their respective states on the roll of honor as eminent jurists.

In these modern days, when great consolidated business enterprises are the absorbing thought of men of financial strength, we often hear it said that the country needs "business men" in the National Congress. But it may not be inopportune to remark that a casual glance at our country's legislative history will reveal that every great and substantial and statesman-like movement that has redounded to our national honor has sprung from the brain of men who were eminent as lawyers. They have seemed best equipped to grasp the essentials of government, to forecast the future, to know the workings of the natural impulses of human nature, and to frame constitutions and draft laws that would withstand the bickering cavils of the hour and make liberty permanent and secure. In contrast with them the names of the "business men" in the halls of Congress are forgotten memories. They have left no lasting memorials of the places they attempted to fill.

The science of government is not a matter of business. It is a matter of statesmanship that requires learning in all history, a knowledge of all governments, a broad and comprehensive understanding of the rights of men and the constitutional history of our country. If the time shall come when our national energies shall be absorbed in devising ways and means to enable the rich to grow richer, to lose sight of the great future for the emoluments of the hour, then will we see the beginning of our decay, and another Gibbon may arise to write the Decline and Fall of the United States. Those who have not thought upon this subject would do well to read the work of Brooks Adams on the Civilization and Decay of Nations.

This nation was born to live. It was founded by statesmen. It must be sustained and maintained by statesmen. Let us not forget the lives and work of its founders. Looking back into the past, let us emulate their example, and, looking into the future, let us not forget the wisdom of their teachings. In this spirit we can always profitably study the beginnings of our national life.

No document in our country's history has been so many times spoken of in words of highest eulogy, so frequently mentioned in the editorials of the press, in the fields of debate, and in published public writings and national history as the Declaration of Independence. No other document has been so frequently appealed to in the political discussions, from the days of the debates between Lincoln and Douglas, and through the contentions over the right of the southern states to secede from the Union, to the period of the acquisition of the islands of Porto Rico and Philippines, as the Declaration of Independence. All shades of opinion have referred to it as the foundation of their political faith, no matter how fierce were their conflicting contentions or how divergent their ultimate aims. It became the halo of enduring fame to Thomas Jefferson. Yet from the standpoint of the lawyer it does not possess the character of a national public law and has no authoritative force in the field of diplomacy. In such considerations it must take a place with three other public documents, the Farewell Address of George Washington, the Message of James Monroe, and the Emancipation Proclamation of Abraham Lincoln.

Yet the Declaration of Independence lies at the foundation of our country's history. Its declaration of human rights, although borrowed from the teachings of the lovers of liberty from time as old as the Anglo-Saxon race, appeals to us with a fervor greater than the Magna Charta to the inhabitants of England. Its principles have become interwoven into the fabric of our republican government, and we accept it as the richest heritage that our Revolutionary fathers have left to the human race.

In the reverence which I have for the work of the men who gave the colonies the status of states, and created by their union one independent nation, I see the moving power of a supervising and watchful destiny, working in a mysterious way its wonders to perform. Not by foresight, nor by the preconceived opinion of the members of that Colonial Congress or of their constituents, but by the natural

succession of inevitable events, it became their office to cement a union and constitute a nation. American independence was not an act of sudden passion, but it sprang from hardships and deprivations, from oppressions and burdens, from miseries and misfortunes, from bloodshed and battles, from aspirations and hopes. In the language of Bancroft, "The Americans were persuaded that they were set apart for the increase and diffusion of civil and religious liberty; chosen to pass through blessings and through trials, through struggles and through joy, to the glorious fulfilment of their great duty of establishing freedom in the new world and setting up an example to the old." The first step in that great work was the Declaration of Independence.

This memorable event has furnished a theme for the orator and the poet, and has been dwelt upon with a natural pride by the American people. The mass of the people are gratified with the picture, as it now presents itself, in all the splendor of our achievements, but the inquisitive mind looks back to the moment of its conception, and is desirous of contemplating the throes of its birth. May we not indulge the hope that some brilliant historian, some favorite son of genius, who, with the sagacity and fascinating style of Macaulay, and the indefatigable research and splendid diction of Gibbon, will record the scene. The hesitation and doubt with which it was contemplated and the solemnity of the moment when the passage of the Rubicon was resolved upon, more adventurous than that of Caesar, can only be described by the pen of a master.

The growth of the sentiment in favor of independence, so subtle in its beginning, so sudden in its expansion, so universal in its sweep that within less than two years it took the hearts of the American people within its sympathetic embrace, is an interesting illustration of how the souls of men may be moved as the waters of the ocean heave and swell under the pressure of the storm.

In 1774 no colony desired independence. The Colonial Congress was not created to declare independence. Its delegates were instructed to seek a reestablishment of the just rights and liberties of the people and a restoration of union and harmony between Great Britain and the colonies. Washington, when he took the command of the army, abhorred the idea of independence, and shortly before had said that no such thing was desired by any thinking man in all North America. And Jefferson said that before that

time he had never heard a whisper of a disposition to separate from Great Britain.

In the summer of 1775 the Congress publicly declared that it had no designs on independence. It continued to petition King George for a redress of grievances and for a happy reconciliation with England on terms in harmony with the principles of the British Constitution.

Benjamin Franklin was waiting for the spontaneous action of a united people before openly declaring for independence. Thomas Paine had written his "Common Sense." He knew that there was no well-developed thought of a government without a king, and the hope of a continued colonial existence on some basis of a reconciliation with England must be overcome. He knew the force of the blows he must strike, and that the passions of people must be aroused. He appealed to their reason and to their hearts. He rose to the declamation of the orator as the following extracts will show:

"But where, say some, is the King of America? He reigns above. In America the law is King. In free countries there ought to be no other. . . . Nothing can settle our affairs so expeditiously as an open and determined declaration for independence. . . . Every quiet method for peace hath been ineffectual; our prayers have been rejected with disdain; reconciliation is now a fallacious dream. Bring the doctrine of reconciliation to the touchstone of nature. Can you hereafter love, honor, and faithfully serve the power that hath carried fire and sword into your land? Ye that tell us of harmony, can ye restore to us the time that is past? The blood of the slain, the weeping voice of nature cries, 'tis time to part. The last chord is now broken; the people of England are presenting addresses against us.

"A government of our own is our natural right. . . . O! ye that love mankind! ye that dare oppose not only tyranny but the tyrant, stand forth! Every spot of the old world is overrun with oppression. Freedom hath been hunted around the globe. . . . Europe regards her like a stranger; and England hath given her warning to depart. O! receive the fugitive, and prepare an asylum for mankind!"

This appeal had been read by every member of that Congress, and scattered broadcast among the colonies, but it needed more

than the printed pages of Thomas Paine to stir the people to resolution or the Congress to immediate action.

It was not until the summer of 1776, when the clash of arms had resounded for a year, when the union of the colonies had been cemented by blood poured out in their common defense, when the hosts of the British army were assembled on their shores, when the British navy rode lordly on their coast, discharging on their unprotected lands the Hessian troops, that the fond hope of peace and reconciliation fled.

There was in that Congress one, believing that the time had come to declare to the world that Great Britain had forfeited all obligations of allegiance on the part of the colonies, and that they should be free and independent states, who was keenly alive to the rule of international law which forbids foreign states from forming alliance with rebels. He had read the histories of ancient republics which inspired him with the love of liberty and taught him the fate of tyrants. He was elated with hope, not, however, unmingled with apprehension, for he had seen them tossed by the storms of faction and again awed by the stillness of despotism. He had read the ancient authors and was strengthened by the beautiful portraits which they had painted. He engaged in studies which made him a finished and elegant scholar, and which were calculated to form the character of a firm patriot and an enlightened statesman. He knew that the love of power is so exclusive in its nature that it perverts the judgment and brands as visionary or condemns as false the maxim "that the people are the legitimate source of power"; and he was prepared to break down that wall that separates the aristocratic patricians from the common people. He was ready to unite his fellow citizens by their hatred of the chain which tyrannical power had cast around them.

"He knew that, in the convulsions of states, courage and vigorous enterprise give safety; in such periods inactivity is certain destruction, while bold temerity is often crowned with success."

Such was Richard Henry Lee, of Virginia, who, on the 7th of June, 1776, moved the Declaration: "That these United Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown; and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved." The resolution was

laid over until the morning of the 8th, when all the members were enjoined to attend promptly to take it into consideration. Then followed the most copious and animated debate ever held in Congress on the question of independence.

John Adams supported it as an object of "the most stupendous magnitude, in which the lives and liberties of millions yet unborn were intimately interested," as the consummation of a "revolution, the most complete, unexpected, and remarkable of any in the history of nations."

George Wythe, of whom Jefferson said, "he might truly be called the Cato of his country without any of the avarice of the Roman," gave his unabated energies in support of the resolution for independence, but he was not able to silence its vigorous opposition nor win the support of its adversaries.

Lee supported his resolution by a most luminous and eloquent speech in which he said in conclusion: "Why, then, sir, why do we longer delay? Why still deliberate? Let this happy day give birth to an American Republic. Let her arise, not to devastate and to conquer, but to reestablish the reign of peace and of law. The eyes of Europe are fixed upon us; she demands of us a living example of freedom, that may exhibit a contrast, in the felicity of the citizen, to the ever-increasing tyranny which desolates her polluted shores. She invites us to prepare an asylum, where the unhappy may find solace and the persecuted repose. She entreats us to cultivate a propitious soil where that generous plant which first sprung and grew in England, but is now withered by the poisonous blasts of Scottish tyranny, may revive and flourish, sheltering under its salubrious and interminable shade all the unfortunate of the human race. If we are not this day wanting in our duty, the names of the American legislators of 1776 will be placed by posterity at the side of Theseus, Lycurgus, and Romulus, of the three Williams of Nassau, and of all those whose memory has been, and ever will be, dear to virtuous men and good citizens."

But it became apparent that the delegates were not ready to give to the resolution their united and harmonious approval, and by common consent its final consideration was put over until July 1. But that this postponement might cause as little delay as possible, in the event that independence might be agreed to, it was decided to select a committee to draft a formal Declaration of Independence.

COMMITTEE TO DRAFT A DECLARATION

Accordingly, on the 10th day of June, Congress by ballot elected Thomas Jefferson, John Adams, Dr. Franklin, Roger Sherman, and Robert R. Livingston to prepare the document. So weighty was the duty assigned to these men who were then important personages, and who afterwards became preeminently eminent as the result of their work, and in their country's history, that it will not be amiss to take a moment's glance at their respective characters. They stand out so prominently in that exciting and trying time of the Revolutionary period that their names possess a charm and their lives are a fascinating study.

Thomas Jefferson entered Congress June 21, 1775, when thirty-two years of age. He was born to an independent fortune. He had from his youth been an indefatigable student. He was of a calm temperament and a philosophical cast of mind. He had a delicate organization and was fond of elegance. Music, the most spiritual of all pleasures of the senses, was his chief recreation. He took a never-failing delight in the beauties of the various scenery of the rural life of Virginia and builded himself a home in the loveliest region of his native state. The range of his knowledge was very wide. He was not unfamiliar with the literature of Greece and Rome. He had great power in mastering details as well as in searching for general principles. His profession was that of the law, in which he was methodical and painstaking and successful. He studied the law as a science, and was well read in the law of nature and of nations. By the general consent of Virginia he stood first among her civilians. In his disposition, he was full of liberality and benevolence.

He was endowed with uncommon fortitude and strength of mind. He possessed great firmness and personal courage. In forming his opinions he was slow and considerate, but when once formed he relinquished them with great reluctance. He had an equanimity and command of temper that even his oldest friends could not remember that he ever gave way to the heat of passion. He had a warm and unvarying attachment to his friends and a hospitality that was beyond his means, and which in his old age left him in unexpected poverty. When the troubles of his country arose, he embarked in them with the vigor of youth, and throughout their course he re-

mained foremost among those who led the van in the march of freedom. His political principles were matured by constant application, and he was fitted best for the more silent duties of legislation. He had achieved a reputation as a writer of ability from some state papers which he had written for Virginia. His style was plain but energetic, and now and then abounding sufficiently with manly and sublime touches, not inappropriate to his subject.

The sympathetic character of his nature, by which he was able with instinctive perception to read the soul of the nation, and collect in himself its best thought and noblest feelings, enabled him to give them utterance in clear and bold words. Another has said of him, "No man of his century had more trust in the collective reason and conscience of his fellow men, or knew better how to take their counsel, and in return he became a ruler over the willing in the world of opinion." These were some of the qualities which especially fitted him for the task of writing the Declaration of Independence.

Yet Jefferson, with other of his associates, well knew the natural reluctance with which men cast aside their old political associations with which they had long been attached. He knew the uncertainty which always hangs over the unexplored future. He had been willing with them to wait until all other remedies had been exhausted. But when no other means were left to preserve the rights of the colonies, he was prepared to meet the dangers and trials of a separation from England, and boldly grasped the last alternative, that of absolute independence. He lived to see the labors of his earlier years crowned with more than hoped-for success, exceeding in practical utility their promised advantages.

John Adams was one of the descendants of that pilgrim band who had first landed at Plymouth Rock, seeking an asylum for religious and civil freedom among the forests of the New World. His first impressions were received from minds that had been trained in the school of a Puritan ancestry, and that severe discipline which only their habits and principles could produce, and which fitted him for the sturdy business of life, and equipped him for waging successfully a controversial warfare against the champions of unlimited British authority.

When he entered Congress he had been schooled in the rigid discipline of the hard-working lawyer. He possessed a vigorous

intellect that had been embellished and broadened by a study of political history. The future prospects of his country occupied the attention of his thinking hours. The contentions between the colonists and royal government had been carried on in Boston with a bitterness as nowhere else in America, and he acquired an aversion against the unjust aggressions of King George the Third that made him among the first and most aggressive champions for independence. Indeed he believed that the birth of the sentiment of independence might be traced back to the speech of James Otis on writs of assistance.

He felt a deep-seated determination to continue in his uniform and constant opposition to the enforcement of the English system. This with him was not idle vaporing or vain pretension. It was but a conviction to adhere to the principles which had carried him through perils and labors and discouragements, from the commencement of the Revolutionary contest. When he first arrived in Philadelphia there existed an unfavorable suspicion of him, that he then aimed at a separation of the colonies from England and the establishment of an independent government. This seemed to many of his copatriots as excessively rash and inexpedient. He had a grasp of the logical result of events, and expressed a full conviction that the resolves, and petitions, and remonstrances, and addresses, and non-importation agreements of Congress, while they were essential in cementing the colonies, were but waste paper upon English rulers. He was in his happiest mood when arguing for the independence of his country. He had confidence in the ability of New England to drive away the enemy. He had faith in Washington as a brave and prudent commander. His soul was fired by the cause of his country and the welfare of mankind, and he believed that Providence would not suffer defeat to come.

In his writings and public speeches he drew many illustrations from historical and legal authorities, displaying a wide range of learning. He adorned them with many displays of classical illustrations and enlivened them by numerous sallies of sarcasm and repartee. He had weaknesses of vanity but neither meanness, nor dishonesty, nor timidity. He was humane and frank and clement. He was the hammer and not the anvil, and it was for others to fear his prowess and to shrink from his blare. In that hour of supreme contest the fullest strength of his intellect and noble nature was

called into its severest exercise and strained to the uttermost of its powers. Jefferson said of him that "he was the Martin Luther of the American Independence," and the ablest debater in Congress.

Benjamin Franklin! What shall we say of him? Every reading man knows his history. From poverty and the lowliest walks of life, he rose slowly and surely, by his own exertions and constant application, to places of rank and trust and confidence. He was not only widely known in America, but Europe received him as an honored guest. At the date of which we are speaking he had not yet become the fashion of the cultured city of Paris, but he had acquired that sterling character that made him highly respected by the ministerial officers of England and greatly admired by Fox and Chatham.

His countrymen had not forgotten the insults he bore, when listening with unmoved countenance to the abuse and slander heaped upon his head at the bar of the House of Parliament. McCarthy in his History of the Four Georges said of that event, "The clothes philosophy of Diogenes Teufelsdroch is readily annotated by history. There are garments that have earned an immortality of fame. Such an one is the sky-blue coat which Robespierre wore at the height of his power when he celebrated the festival of the Supreme Being, and in the depths of his degradation when a few days later he was carried to his death. Such an one is the gala coat of flowered Manchester velvet which Franklin wore in his day of degradation, when he was compelled to listen with tranquil visage and a throbbing heart to the fluent invective of Wedderburn, and which was laid away and left unused through five tremendous years, not to be taken from its retirement until Franklin wore it again on the day of his greatest triumph, when he signed that Treaty with England which gave his country her place among the nations of the world."

He was not only a patriot and a statesman, but he had achieved fame as a philosopher. I know of no more touching incident than the subsequent meeting of Franklin and Voltaire at the French Academy of Sciences. They embraced each other affectionately and some one present said: "It is Solon in the arms of Sophocles." At one of those meetings Franklin presented his grandson to Voltaire and asked his benediction. Voltaire placed his hand on the head of the child and with patriarchal solemnity said: "God and

Liberty. This is the only device that becomes the grandson of the great Franklin."

Among the illustrious men of that day whose names are inscribed upon the brightest record that adorns the annals of our country, few possessed more solid attainments than Roger Sherman. What he lacked in the display of rhetorical embellishments, he amply compensated by close reasoning and convincing arguments. He aimed rather to persuade the reason than to triumph over the passions of men. The vigor of his mind appeared more conspicuous in the plain and simple manner in which it was elicited than if it had been ornamented with all the beauties of elocution.

But the energy of his address was not diminished by the absence of fanciful diction. He never indulged in those brilliant bursts of oratory which please and sparkle for a moment and pass away without leaving a trace of their usefulness behind, but by his plain and dispassionate course he attained extensive influence in the councils of his country, and attracted the admiration and esteem of his compatriots.

He was possessed of a strong, discriminating mind which gave him a great and merited ascendency in the deliberative bodies of which he was a member. He may be classed among those extraordinary men who, surmounting the disadvantages of education, have risen to eminence through the superiority of their genius.

It was essential in this important crisis to commit the interests of the colonies to the charge of able and prudent, but firm and fearless representatives. Such a man was Roger Sherman. He was one of the few who, from the commencement of hostilities, foresaw the necessity of entire union and complete independence, and urged with energy the boldest and most decisive measures. He engaged in the defense of the liberties of the colonies, not with the rash ardor of political enthusiasm, nor the ambitious zeal of a lover of popularity, but with the deliberate firmness of an experienced statesman, conscious of the magnitude of the undertaking. There were few in that assemblage of eminent characters whose judgment was more respected or whose opinions were more influential. The boldness of his counsels, the decisive weight of his character, the steadiness of his principles, the inflexibility of his patriotism, his venerable appearance, and his republican manners presented to the imagination the idea of a Roman senator in the early and most exemplary days of the commonwealth.

Robert R. Livingston, then a young lawyer from New York, was the junior member of the committee, being but thirty years of age. It was fitting and almost essential as a matter of expediency and the part of wisdom that New York should be thus recognized. That colony was one of the last to yield its consent to separation from the mother country. The Livingstons were a family having an honorable ancestry and were greatly esteemed and highly respected by their fellow citizens. The influence which their approval of a Declaration of Independence would have upon the people of their colony, so reluctant to join the others in this new confederacy, was a consideration not to be disregarded.

Robert R. Livingston, while yet so young in years, was a man of promise and distinguished parts. While he had not then risen to great distinction, his ability was recognized and his future life of extended usefulness became proof that he was not overestimated by his associates. He became the first Chancellor of New York. It was he who administered the oath of office to George Washington when inaugurated as President of the United States. He was the minister to France who negotiated and signed the treaty for the purchase of the Louisiana Territory.

Perhaps nowhere else, and at no other point in history, were five men of such eminent parts ever selected to act in conjunction in drafting a state paper or in determining the basis of a revolutionary movement. Two of them became eminent jurists: Livingston and Sherman; three of them afterwards served the new nation as ambassadors to the courts of Europe: Livingston, Jefferson, and Franklin; and two of them became Presidents of the United States: Adams and Jefferson.

A kind providence seemed to watch over their lives and permitted them to live to see the full realization of the brightest hopes of the production of their united labors. Livingston lived to the age of 67; Roger Sherman to the age of 72; Jefferson to the age of 83; Franklin to the age of 84; and Adams to the age of 91.

The task of this committee was one of no ordinary magnitude and required the exercise of no common judgment and foresight. The act of declaring independence and the causes which justified it they well foresaw would operate beyond the passing events of the time. They knew that the document they were to prepare must be in harmony with the existing tone of feeling, yet it must be the be-

ginning of the policy the united colonies must pursue in directing the movements of a new and extensive national existence.

They knew the course upon which they were about to embark was surrounded with difficulties and dangers and uncertainties. They knew that clouds and darkness hung over the future. They knew how much they were without experience and the colonies without resources and national friends. No matter how ideal and beautiful seemed the thought of a new and independent nation which prompted the action, they knew they must critically examine the daring adventure and weigh the causes that had set the movement in motion and the principles upon which it was to be declared. They were called to act in a period of great excitement, and when the passions were deeply aroused. They knew that there was a fluctuating public opinion, "and the headstrong impetuosity which made the people, whose act it purported to be, blind to everything but their own wrongs, and the deepest emotions of exasperation and revenge."

Under these conditions and solemnly impressed with the serious responsibilities of their office, the committee began its labor. For two days they sat together in consultation, each suggesting his own respective notions of what the document should contain, and minutes made of them. It is to be regretted that there has not come down to us a full report of that protracted private conference. It would have exhibited the workings of those master minds, while engaged in a dialogue of state that was to affect the lives and fortunes of the living and the welfare of millions then unborn.

In the election of the committee Jefferson had received the highest number of votes, and by the courtesy of parliamentary usage would be the temporary chairman. When the time arrived to select one of their number to reduce to writing and put in form the result of their deliberations Jefferson was agreed upon. The reasons which prompted this have been foreshadowed in what I said before of his peculiar fitness and aptitude for the duty. It was a task not solicited by him, nor did he have any ambitious rivals. None sought it, and perhaps none would have evaded its responsibilities.

ADOPTION OF THE DECLARATION OF INDEPENDENCE

During the first four days of July Congress sat in deliberation upon the resolution of Richard Henry Lee and the Declaration of Independence.

We might say of that assembly what John Adams said in a letter to William Tudor of the Congress of 1774:

"The Congress is such an assembly as never before came together on a sudden, in any part of the world. Here are fortunes, abilities, learning, eloquence, acuteness, equal to any I ever met with in my life. Here is a diversity of religions, educations, manners, interests such as it would seem almost impossible to unite in one plan of conduct. Every question is discussed with a moderation, an acuteness, and a minuteness equal to that of Queen Elizabeth's privy council."

As the morning of each day opened, John Hancock, in his elegant attire, young, vigorous, and courteous in manner, sits in the President's chair. Chivalrous and aristocratic by nature, but not haughty or domineering in spirit, he rules over the assembly with becoming dignity and equal justice.

Looking over the assembly the eye soon detects the venerable Franklin, reared in poverty and adversity. His serene countenance now displays the satisfaction of well-earned honors at home and distinction abroad. His face bears a kindly expression, but is visibly marked with the character lines of deep thought and inflexible resolution.

Turn from him of seventy years to the young lawyer from New Jersey, Francis Hopkinson, then but twenty-nine years of age, four years the junior of Jefferson. His small features are animated by the unceasing activity and versatility of the powers of his mind.

Not far distant sits another young lawyer from Boston, Robert Treat Paine, who had won distinction in the prosecution of the English Captain Preston and his men for the "Boston Massacre," and who is to become, in later days, a member of the Supreme Court of Massachusetts, and to live to the ripe old age of 84.

South Carolina in 1775 recalled John Rutledge and Christopher Gadsden to take part in the defense of that colony, and selected Thomas Heyward, a young lawyer of thirty years of age, to fill one of these vacancies. He read the Roman historians and poets in their native tongue. He now sits among the sages of this Congress, being enlightened and elevated by the mellow wisdom of Franklin and the indignant eloquence of Adams.

There was George Read, who had resigned an appointment from the Crown as Attorney General of Delaware to become a delegate

in Congress. He was slow in speech, but his profound legal knowledge was evidenced by his great success, and his careful, studious habits by the marginal notes written on almost every page of the books of his law library. In time he is to become a member of the convention which framed the Federal Constitution, and yet later a member of the United States Senate, and in 1793 Chief Justice of the state of Delaware. Dignified in his demeanor, he would not tolerate the slightest violation of good manners.

Again looking around, may be seen a man in middle life, with round face and aquiline nose and black eyes and black hair; when standing, his body is seen to be erect and well proportioned. He was yet to serve his state in many capacities, and lived to the age of eighty-one. It is William Williams, of Connecticut. Close by sits Samuel Huntington, a man of great simplicity and plainness of manners, averse to all pageantry and parade, who in time is to become President of Congress, a Chief Justice and Governor of Connecticut.

We must stop and look at one whose face betokens great learning and from whose dignified appearance we expect great things. It is Dr. Witherspoon, the philosopher, the educator, and the divine, now turned civilian in the cause of his adopted country. The Latin and French language were almost as familiar to him as the English, and he could read the Greek and the Hebrew. The visitor at Princeton College will stop to stand at the foot of his grave, and contemplate the character and career of this remarkable man.

Here was another also born in Scotland, the colleague of John Dickinson and Robert Norris and Benjamin Franklin, who is to leave a lasting impress upon the history of his country, and selected by George Washington to sit on the bench of the Supreme Court of the United States with John Jay, Thomas Johnson, William Cushing, and John Blair. It is James Wilson, of Pennsylvania.

There, too, was Stephen Hopkins, once Chief Justice of Rhode Island, the oldest man of all. His form is bent, his thin locks fringing a forehead bowed with age and honorable service, and his hands shake tremulously as he folds them in his lap.

There sat Richard Stockton, who in his youth had made a study of the great orators of antiquity, and by the excellency of his education could read their speeches in their original tongue. He had listened to the great orators of England, and his native genius

turned all these advantages to his own superior and powerful eloquence. In his forensic career he became a celebrity. In a eulogy pronounced after his death it was said of him that his eloquence only wanted a theater like Athens to have rivaled the Greek and Roman fame.

We must not overlook Samuel Adams "who eats little, drinks little, and thinks much"—that strong man who has led his countrymen up to this day's possibilities. He is one of the master spirits of the times, cool, watchful, and steadfast, now that the hour of triumph has arrived, as when in darker days he had taken up the burden which James Otis could no longer bear. Jefferson said of him, "He was truly a great man, wise in council, fertile in resources, immovable in his purpose. . . . So clear in his views, abundant in good sense, and master always of his subject, that he commanded the most profound attention whenever he rose in an assembly by which the froth of declamation was heard with the most sovereign contempt."

There was Samuel Chase, one of the most extraordinary men of his age, who became a Justice of the Supreme Court of the United States, the close friend of Luther Martin and Robert G. Harper and William Pinkney; and Thomas McKean, the most unique character of the day, the Andrew Jackson of the period; and John Dickinson described as that "shadow, slender as a reed, and pale as ashes;" and Caesar Rodney, who came in on the morning of the last day in boots and spurs after a hasty ride from Delaware, "the oldest looking man in the world, tall, thin, pale, his face no bigger than a large apple, yet beaming with sense and wit and humor;" and John Adams, bold, fertile, and fiercely eloquent; and Roger Sherman who lived to be famous in more than one generation. There was Benjamin Harrison, who daily presides over the committee of the whole House, the father of a line of presidents.

Mr. Richard Henry Lee was then absent in Virginia. "For a few minutes," says Bancroft, "everyone felt the responsibility of acting finally on the most important question ever agitated in the assembly. In the absence of the mover of the resolution, the eyes of every one turned towards its seconder, John Adams." We have no very complete record of the speech John Adams made on that morning. He tells us himself that at one time or another all the arguments for it and against it had been exhausted, and were be-

come familiar, and he says he began by saying that this was the first time in his life that he had ever wished "for the talents and eloquence of the ancient orators of Greece and Rome, for I was very sure that none of them ever had before him a question of more importance to his country and to the world."

Bancroft says of that speech: "He had made no preparation for that morning; but for many months independence had been the chief object of his thoughts and his discourse, and the strongest arguments ranged themselves before his mind in their natural order. Of his sudden impetuous and unpremeditated speech no minutes ever existed, and no report was ever made."

The new delegates from New Jersey, Mr. Richard Stockton, Mr. Francis Hopkinson, and Dr. Witherspoon, had come in and expressed a great desire to hear the arguments repeated. The instructions which New Jersey had given to these delegates were not peremptory in respect to their action in favor of a declaration of independence. Power had been given to them to join with the delegates of the other colonies in that act if they should judge it necessary or expedient to the support of the just rights and liberties of America.

Let John Adams describe what followed: "All was silence; no one would speak; all eyes were turned toward me. Mr. Edward Rutledge came to me and said, laughing, 'Nobody will speak but you upon this subject. You have all the topics so ready that you must satisfy the gentlemen from New Jersey.' I answered him, laughing, that it had so much the air of exhibiting like an actor or gladiator for the entertainment of the audience that I was ashamed to repeat what I had said twenty times before, and I thought nothing new could be advanced by me. The New Jersey gentlemen, however, still insisting on hearing at least a recapitulation of the arguments, and no other gentleman being willing to speak, I summed up the reasons, objections, and answers in as concise a manner as I could."

Dr. Witherspoon had been the President of Princeton College and brought with him from Scotland his fame as a literary character. He had cast aside his foreign prejudices, and embraced with facility the ideas and habits of a new country and a new state of society. He had become an American the moment he landed on its shores. The professors of law were lost in astonishment when he

appeared in Congress as profound a civilian as he had before been known as a philosopher and a divine. When Adams had concluded, he arose and said he was fully satisfied and that the country was ripe for the great decision, and delay was fraught with peril.

There sat many more men, strong of purpose, keen of intellect, watchful and hopeful of their country's welfare and the cause of the human race, waiting with impatience the culminating act of the drama that was to declare to the world why the colonies should be free and independent states. John Jay was absent in New York. James Wythe was attending a convention in Virginia. Charles Carroll, of Carrollton, was not elected until July 4, and was detained in Maryland where he had gone to have her convention release her delegates from bondage.

But there were present a galaxy of eminent men, many of whom were in after days to be selected to fill all the varied high stations of life, such as judges, envoys, senators, vice-presidents, and presidents of the United States, to whom Thomas Jefferson must listen as they scanned and scrutinized and changed and altered the document that was to become the rich heritage of the American people.

Many of the alterations, some thirty in number, rendered its language more terse, more dispassionate, and more exact, but some were of great significance as we shall hereafter have occasion to speak, and about one-fourth of the original draft was stricken out.

Jefferson was somewhat disturbed at what he regarded as depredations and mutilations of the document. He, himself, tells this incident that occurred during the proceedings:

"I was sitting by Dr. Franklin, who perceived that I was not insensible to these mutilations. 'I have made it a rule,' said he, 'whenever in my power, to avoid becoming the draughtsman of papers to be reviewed by a public body. I took my lesson from an incident which I will relate to you. When I was a journeyman printer, one of my companions, an apprentice hatter, having served out his time, was about to open shop for himself. His first concern was to have a handsome signboard with a proper inscription. He composed it in these words "John Thompson, hatter, makes and sells hats for ready money," with a figure of a hat subjoined. But he thought he would submit it to his friends for their amendments. The first he showed it to thought the word "hatter" tautologous, because followed by the words "makes hats" which show he was a hat-

ter. It was struck out. The next observed that the word "makes" might as well be omitted, because his customers would not care who made the hats; if good and to their mind they would buy by whomsoever made. He struck it out. A third said he thought the words "for ready money" were useless as it was not the custom of the place to sell on credit. Every one who purchased expected to pay. They were parted with, and the inscription now stood "John Thompson sells hats." "Sells hats?" says his next friend. "Why, nobody will expect you to give them away. What, then, is the use of that word?" It was stricken out, and "hats" followed it,—the rather as there was one painted on the board. So his inscription was reduced ultimately to "John Thompson" with the figure of a hat subjoined.' "

At last the Declaration of Independence was adopted. As we look back from this remote period of time, we see an evidence not then fully visible of the superintendence of a ruling Providence over the event and the lives of the men who were instrumental in bringing it about. It seemed essential that those who were chief actors in the stirring and revolutionary times should live long enough to see the new government established on a solid and lasting foundation. Their days were lengthened like the patriarchs of old. Two of them lived to be eighty-one years of age, William Williams and James Wythe. One of them lived to the age of eighty-two, Samuel Adams. Two of them lived to the age of eighty-three, Thomas McKean and Thomas Jefferson. One of them lived to the age of eighty-four, Benjamin Franklin. One of them lived to the age of eighty-seven, William Floyd. One of them lived to the age of ninety-one, John Adams. Many others lived beyond the age of seventy, among whom may be mentioned Roger Sherman, George Clymer, Stephen Hopkins, and Elbridge Gerry.

Out of what other assembly of about fifty members can be found so many men who lived such prolonged lives of lasting usefulness to the human race? May we not pause to inquire whether this did not mean something more than the mere accident of time?

JOHN ADAMS

The Declaration of Independence has been the "aurora of fame" to Thomas Jefferson. It is the fatality of time to forget the actors

in the drama of life, except those whose names are by accident of events put in the foreground of the picture. I have no wish, and far be it from my purpose to detract in the least from the just due of Thomas Jefferson, but to do justice to another who did more than Jefferson to bring about the independence of the colonies and to lay the foundation of a new government among the nations of the earth. I have elsewhere said all that need be said in praise of the man who wrote the draught of the document and pointed out that he was the "amanuensis" of the committee to reduce to form the results of their deliberations. The question is somewhat delicate to handle, and I prefer to rest it upon the expressed evidence of those who were present at the time, and whose testimonials should not be questioned.

Richard Stockton, after he returned home from Congress, when surrounded by his anxious political friends, just after the 4th of July, 1776, who were eager for minute information in respect to the great event which had just taken place, said: "The man to whom the country is most indebted for the great measure is Mr. John Adams, of Boston. I call him the Atlas of American Independence. He it was who sustained the debate, and by the force of his reasoning demonstrated not only the justice but the expediency of the measure."

Mr. Madison, though not himself present, in a letter to Mr. G. A. Otis, said: "I well recollect that the reports from Mr. Adams's fellow laborers in the cause from Virginia filled every mouth in that state with the praises due to the comprehensiveness of his views, the force of his arguments, and the boldness of his patriotism."

Mr. Thomas Jefferson on one occasion said: "John Adams was our Colossus on the floor; not graceful, not elegant, not always fluent in his public addresses, he yet came out with a power both of thought and expression that moved us from our seats." Again in a letter addressed to W. P. Gardner in 1813, who meditated the publication of an ornamented copy of the Declaration of Independence, Mr. Jefferson said: "No man better merited than Mr. Adams to hold a most conspicuous place in the design. He was the pillar of its support on the floor of Congress, its ablest advocate and defender against the multifarious assaults it encountered; for many excellent persons opposed it on doubts, whether we were provided

sufficiently with the means of supporting it, whether the minds of our constituents were yet prepared to receive it, who, after it was decided, united zealously in the measures it called for."

Again in 1823 Mr. Jefferson, in a letter to Madison, said: "I did not consider it as any part of my charge to invent new ideas altogether and to offer no sentiment which had ever been expressed before. Had Mr. Adams been so restrained, Congress would have lost the benefit of his bold and impressive advocations of the rights of revolution. For no man's confident and fervid addresses more than Mr. Adams's encouraged and supported us through the difficulties surrounding us, which, like the ceaseless action of gravity, weighed on us by night and by day. . . . As to myself, I thought it a duty to be, on that occasion, a passive auditor of the opinions of others, more impartial judges than I could be, of its merits and demerits."

When such men as Richard Stockton and James Madison and Thomas Jefferson have, in common sentiment, selected John Adams from among that assemblage of great men as the foremost leader and advocate of independence, the American people should hold him in respectful reverence, and name him among the trio of the fathers of our liberties, Washington, Adams, Jefferson.

WAS A DOCUMENT FOR THE TIMES

The Declaration of Independence was not intended as a document to be used by all peoples, in all times, as justification for rebellion, revolution, or independence. It was an instrument drafted in a form to suit the exigency of the situation of the colonies, and to justify them in the eyes of the world in resisting the power of the English arms. It is true, it contains many general truths, which are applicable to all people and to all nations; which applied with equal force to the rights of Englishmen as well as to the rights of Americans, and which had been long recognized under the Constitution of Great Britain, and in the writings of Grotius and Locke and Montesquieu and others. But this general truth does not militate against the statement that it was a document for the times and for the people for whom it was written. This special purpose must not be forgotten when we stop to inquire into the scope of its meaning.

Jefferson himself did not claim for it more than this, for in a

letter written to Henry Lee on the 8th of May, 1825, he said: "When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence. Not to find out new principles or new arguments never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests, then, on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc."

If we look at the instrument itself we find it filled with internal evidence that it was a document for the time. Perhaps the most prominent one is the long list of grievances set forth as reasons for separating from England and which constituted the "facts submitted to a candid world." They have long since lost their meaning to the general reader, but they were common complaints at the time in every colony and were marshaled by Jefferson with masterly skill.

"He generalized on these political evils and wove them all into a common complaint. He was familiar with American history, and, making the natural rights of man his guiding political principle, he proceeded to illustrate this controlling idea by instances in the history of colonial America. The result as it came from the alembic of his mind was the Declaration." But all these were the incidents of the time, having existence only under the rule of George the Third, and between the years 1768 and 1776. But for them, the Declaration of Independence might not have been written, and the separation of the colonies from England would not have taken place when it did.

Thorpe in his Constitutional History of the United States says: "As a political manifesto, it was nothing more than a rhetorical statement of ideas, which for some time had been freely circulated

through the land. Lee's resolution of independence was largely a piece of rhetoric, yet it stood for an idea. The declaration meant more than a mere outburst of revolutionary enthusiasm. In practical politics it announced the birth of a new nation."

It was a declaration written for men of the Anglo-Saxon race, who had been engaged in experimental local self-government for a century and a half, and who had brought with them from Europe the high instinct of personal rights secured under the English Constitution. It was a declaration written at a time when these rights were no longer respected and when the King of Great Britain, by "repeated injuries and usurpations," was establishing an absolute tyranny over them. When others, after patient endurance, have come to suffer as they had suffered, and have attained to the same high ideals and capabilities for self-government which they possessed, and are prompted by the same noble purpose, then, but not before, let them appeal to it in justification for revolution and independence.

All the world beside may rest under the assurance that the great and noble people who have made the United States the great and ruling power of the American continent will never unjustly oppress or unduly wrong any other people. While we demand respectful obedience to established government, we will not forget the duty of the sovereign power to citizens and subjects, and will be ever mindful of the great truths declared in favor of human rights, and extend to all who come under our jurisdiction the blessings and freedom of our republican government.

ALL MEN CREATED EQUAL

The declaration that "all men are created equal, and they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness" has been a constant subject of disputation. It was a sentiment not new when inserted in the Declaration of Independence. A century and a half before, Grotius, in his introduction to Dutch Jurisprudence, had said "through birth all men are equal." Montesquieu, in his Spirit of Laws, said: "In republican governments, men are all equal; equal they are also in despotic governments; in the former because they are everything; in the latter because they are nothing."

When literally construed the clause that "all men are created

equal" is in no sense true. I know no place where the inequalities of birth are so strongly contrasted as in Tucker on the Constitution where he says, "Races of men differ widely. Men of the same race are unequal. In physique, we have giants and dwarfs, athletes and cripples, a Hercules and a hunchback; in mind, we have a Napoleon and a Louis, a Newton and an idiot; in morals, a Washington and an Arnold, a La Fayette and a Marat. In music, we find a genius for harmony, and another who can not distinguish one air from another; and so in poetry, art, science, philosophy, and statesmanship."

If we say they are created equal before the law, it is true of the American citizen, but it was not recognized as true at that time of the colored race held in slavery. If we say it referred to equality of rights or to civil and political equality, it was true; but it was not applied to all men, for most all the colonies had a class of people who were not recognized as having any civil or political rights.

Conway, in his introduction to the writings of Thomas Paine, says that at that time slavery existed in all the American colonies and that in Pennsylvania there were not less than 6,000 slaves. In March, 1780, four years after the Declaration of Independence, Pennsylvania passed an act abolishing slavery, the first legislative measure of negro emancipation in Christendom.

If we speak of equality of rights as Adams understood it to be under the English Constitution, it was true.

"The Constitution is not grounded on 'the enormous faith of millions made for one.' It stands not on the supposition that kings are the favorites of heaven, that their power is more divine than the power of the people, and unlimited but by their own will and discretion. It is not built on the doctrine that a few nobles or rich commons have a right to inherit the earth, and all the blessings and pleasures of it; and that the multitudes, the millions, the populace, the vulgar, the mob, the herd, and the rabble, as the great always delight to call them, have no rights at all, and were made only for their use, to be robbed and butchered at their pleasure. No; it stands upon this principle, that the meanest and lowest of the people are, by the unalterable, indefeasible laws of God and nature, as well entitled to the benefit of the air to breathe, light to see, food to eat, and clothes to wear, as the nobles or the king. All men are born equal; and the drift of the British Constitution is to preserve

as much of this equality as is compatible with the people's security against foreign invasions and domestic usurpation."

But Congress understood that England did not extend the rule beyond her own people, as we may see by a paragraph in the draft of the Declaration of Independence as originally presented by the committee to Congress, which reads:

"He has incited treasonable insurrections of our fellow-citizens, with the allurements of forfeiture and confiscation of our property. He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian king of Great Britain. Determined to keep open a market where men should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce. And that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he also obtruded them; thus paying off former crimes committed against the liberties of one people with crimes which he urges them to commit against the lives of another."

It will be observed that Jefferson did not contemplate the abolition of slavery, for the paragraph only denounced the seizure of negroes in Africa and transporting them to America to be sold into bondage, and left the domestic institution of slavery to continue as before.

But it is quite evident Congress did not mean to declare that the slave race were created equal with themselves, for it struck out of the Declaration the entire paragraph above quoted, and inserted in lieu thereof the single clause, "has incited domestic insurrection among us."

In April, 1775, Lord Dunmore, the Royal Governor of Virginia, circulated a rumor that he would incite insurrection among the slaves. About the same time he caused the powder stored at Williamsburg to be removed. The people, being apprehensive of the threatened insurrection among the slaves, demanded of Lord Dun-

more that the powder be returned. In the course of his reply he renewed the threat and said: "The whole country can easily be made a solitude, and by the living God, if any insult is offered to me or to those who have obeyed my orders, I will declare liberty to the slaves and lay the town in ashes."

In November, 1775, he issued a proclamation in which he declared freedom to "all indented servants, negroes, or others appertaining to rebels" if they would join for reducing the colony to a proper sense of its duty. I hope it will oblige the rebels to disperse to take care of their families and property. Similar threatened emancipation of slaves had been made in North and South Carolina. It was this threatened emancipation that was referred to in the original draft of the Declaration, in the clause stricken out by Congress, and this it was which Congress denounced as inciting "insurrection among us." Thus clearly and pointedly did Congress, not made up of John Browns and Abraham Lincolns, declare in the Declaration of Independence that negroes held in slavery were not men created equal with them, and were not of the men who were endowed with the inalienable rights of life, liberty, and the pursuit of happiness.

The Southern Confederacy based its creed on the declaration that the colored race were not born with rights equal to the white race. Alexander H. Stephens, in a speech made at Savannah, Ga., on the 21st of March, 1861, said: "Our new government is founded upon exactly the opposite idea; its foundations are laid, its cornerstone rests upon the great truth that the negro is not equal to the white man, that slavery, subordination to the superior race, is his natural and normal condition."

But this was an error. It was a sandy foundation, and the government built upon it fell when "the storm came and the wind blew." That watchful Providence that hovered over the Continental Congress, and held the destiny of the nation in His hand, in the fulness of time placed Abraham Lincoln in the President's chair, and at his will the unsheathed sword of millions of white men settled the question that "life, liberty, and the pursuit of happiness" were of the inalienable rights of the colored race in America, and gave to the Declaration of Independence a wider and more universal application.

But the American people were not content to let this great ques-

tion of human rights rest upon the uncertain meaning of that clause in the Declaration of Independence, and incorporated a new declaration in the fundamental law of the land.

The prohibition of slavery now rests in the 13th Amendment to the Constitution of the United States; and the several states were not prohibited from depriving persons of life, liberty, or property without due process of law until the adoption of the 14th Amendment. The Declaration of Independence was not a law, but a declaration of principles, made for the time and the occasion. The Constitution is the supreme law of the land, and there the sacred rights of Americans are made secure against the convulsions of popular sentiment and the mutations of changing time.

Shall these rights of men, thus sacredly and fundamentally secured to American citizens, be extended to alien races in our colonies and provinces is a question not within the purpose of this paper to consider. I am content to leave that to the wisdom and justice of the great heart of the American people to settle, having all confidence that, when it shall be determined, it shall be determined right.

> "New occasions teach new duties;
> Time makes ancient good uncouth;
> They must onward still and upward
> Who would keep abreast of truth."

CONSENT OF THE GOVERNED

The clause in the Declaration that governments derive "their just powers from the consent of the governed," when interpreted in the sense in which it was then understood, is an undeniable and unimpeachable truth. But when it has been used as an excuse for an unjustifiable rebellion, or for the subversion of an established good government, it has been perverted from its true meaning.

Our national history has furnished a forcible illustration of a rightful and a wrongful construction of it. Jefferson Davis, in his inaugural address in 1861, said: "The declared compact of the Union from which we have withdrawn was to establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity; and when, in the judgment of the sovereign states now composing this confederacy, it has been perverted from the purpose for which it was ordained, and ceased to answer

the ends for which it was established, a peaceable appeal to the ballot-box declared that, so far as they were concerned, the government created by that compact should cease to exist. In this they merely asserted the right which the Declaration of Independence of 1776 defined to be inalienable. Of time and occasion of this exercise they as sovereigns were the final judges, each for himself."

Abraham Lincoln said the "government of the people, by the people, and for the people shall not perish from the earth." Both had in mind the same great truth. One used it as an excuse for the subversion of the established government; the other used it as a justification for the maintenance of the same government. The one used it in justification of rebellion by certain states; the other used it in justification of the right of the general government to suppress that rebellion. The one used it in justification of the claim of the people of a locality to be the sovereign and final judges of that question for themselves; the other used it in justification of the right of the whole people to decide that question. The one used it in behalf of a discontented people; the other used it in behalf of a nation in its sovereign capacity. The one used it in a perverted sense for selfish and unjustifiable ends; the other used it in the sense the framers of the Declaration intended it should be used, as a great truth, to be weighed in the balance by the wisdom of an intelligent and patriotic mankind.

Abraham Lincoln had read the Declaration of Independence in the spirit of the times and of the men who framed it, and his interpretation of it, made sacred by the blood of men, should be a warning to all who would incite insurrection in any part of our domain, at home or abroad.

NOT A DECLARATION AGAINST COLONIAL GOVERNMENT

During the early period of the debates in Congress on the Spanish war and the results of peace, it was frequently said the United States could not acquire outlying territory, either as the result of war, conquest, or treaty, without violating the Federal Constitution. Some venerable senators and some eminent jurists outside of Congress made speeches and wrote articles for standard magazines against the right to accept or hold the Philippine Islands on constitutional grounds. I think I can safely assert that no one does so any longer.

When that debate in the Senate of the United States was going on, many, nay nearly all of the senators who spoke on the subject, declared that the United States did not intend to hold the Islands as colonies or provinces; that the United States, by the Declaration of Independence, had solemnly declared its policy against colonial governments, and that whatever land or islands should be acquired under the Treaty of Paris should be held and governed as territory, with an ultimate purpose of admitting the same into the Union as states, using the Louisiana purchase as an apt illustration of the policy to be pursued by our government. The legislation of the last Congress and the prospective legislation of the present session relating to the Philippines is enough to justify the assertion that that doctrine is also abandoned.

It is right and just that it should be abandoned. It never had any foundation in the Declaration of Independence. The Congress which adopted that instrument did not intend, and did not, in fact, declare against colonial governments as such. Such was not its purpose, scope, or meaning. This is plainly evident from the history of the times, the action of the several assemblies, the proceedings of the Colonial Congress from its first sitting in 1774 to the 4th of July, 1776, and from the context of the Declaration itself.

From the days of the settlements at Jamestown and the landing of the Pilgrims at Plymouth the people had been living under colonial governments. They had never been heard to complain of colonial governments as such. Indeed, it will appear that they were so attached to the mother country, and so well satisfied to remain as colonists, that it took years of oppression and a year of actual warfare against them by English troops before they became willing to sever their colonial relations with Great Britain.

Prior to the Stamp Act, they had never seriously complained of any act of the British Parliament or the rule of the British King. The Colonial Congress, when called into existence, aimed at the continuance of the colonial government. Neither the delegates nor their constituents desired independence. The instructions to the delegates from the several colonial legislatures and conventions looked only to a redress of grievances and a restoration of the happy relations that had existed between the colonies and the mother country prior to 1763.

We search the Declaration of Independence in vain for any words

against colonial governments, as such, or against the right of an established government to acquire and govern colonies or provinces. In the instrument itself is found the solemn declaration "that, as free and independent states, they have full powers to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do."

"All other acts and things which independent states may of right do" was an all-comprehensive expression, including the exercise of all powers which belong to established governments, and which have been recognized by the law of nations as essential elements of sovereignty. It must have been the purpose, as it was thus the declared purpose, that the new state should have all the powers which attach to other independent nations in addition to those of declaring war, of concluding peace, of contracting alliances, of establishing commerce. As other independent nations have through all times exercised the power of acquiring territory and governing colonies and provinces, so it was one of the powers which that declaration recognized as belonging to the United States.

Alexander Hamilton, in one of his speeches, contended that, in the sending of delegates to the Continental Congress, the idea of a union between the colonies was carefully held up, and that there followed the Declaration of Independence which made them free and independent states, and that in their union and freedom they became vested with all the powers of sovereignty. He quoted at length the clause that "as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things that independent states may of right do," and then said: "Hence we see that the union and independence of these states are blended and incorporated in one and the same act, which, taken together, clearly imports that the United States had in their origin full power to do all acts and things which independent states may of right do; or, in other words, full power of sovereignty."

Neither did the framers of the instrument make any declaration against monarchies, nor for the overthrow of all kings, nor in favor of a universal system of republics. In the language of Bancroft:

"They did not declare against monarchy itself; they sought no general overthrow of all kings, no universal system of republics;

nor did they cherish in their hearts a lurking hatred against princes. Loyalty to the house of Hanover had, for sixty years, been another name for the love of civil and religious liberty; the vast majority, till within a few years or months, believed the English Constitution the best that had ever existed; neither Franklin, nor Washington, nor John Adams, nor Jefferson, nor Jay had ever expressed a preference for a republic. The voices that spoke for independence spoke also for alliances with kings. The sovereignty of George the Third was renounced, not because he was a king, but because he was deemed to be a 'tyrant.' "

The United States, grand and glorious as she is, cherishes the Declaration of Independence. She looks back with admiration upon the free and independent spirits of the men who framed it. She recognizes the ideal in the realm of thought, but from her ever widening experience, through the darkness and storms of conflicting and uncertain conditions which have tested the bravery and undaunted spirit of her citizens, she has seen the necessity of having a strong and practical administrative government. She rules over a race of eighty millions of people whose progress can never be stayed. No one continent can be their fixed boundary. No oceans can hem them in. No one hemisphere can circumscribe their activities. But, wherever they go, it will be under the starry banner of Columbia, and with the true spirit of the Declaration of Independence.

PAPERS READ BEFORE THE SECOND ANNUAL MEETING

JANUARY 10, 1902

THE LAWYER AND HIS JURY

BY MR. COMMISSIONER HASTINGS

The title of this paper was chosen somewhat deliberately. It at first suggested itself as "The Judge and his Jury," but it was considered that, in the first place, the judge is also a lawyer, at least by courtesy, and in the second place that the judge's innovations must be ratified, if they are not suggested by the practitioners at the bar before him.

It is not intended to discuss at any length the history of the jury in law. Whether it is regarded as the descendant and successor of the old Teutonic folk meetings, where on occasion the women took part, and, as Tacitus tells us, approval was expressed by the clashing of shields and weapons and disapproval by groans and uproar; whether it is considered to be an outgrowth of the oath of compurgation among the Saxons, or, according to the now-prevailing opinion, as a result of successive modifications of the royal inquisition introduced by the Norman kings, its present form and the one in which it is so firmly implanted in state and federal constitutions is the result of legal development. That legal development has been in the hands of lawyers.

Of course, this is not to say that they have been alone in its elaboration. They have had the support of wise and public-spirited rulers to uphold and sustain them. They have had a liberty and truth-loving people, intelligent and virtuous enough the truth to say (*veritatem dicere*) in their verdicts. So it has come about that alone among modern nations the English-speaking race has developed this tribunal, drawn from the body of the people, to find and state the truth as to the main issues in disputed cases, with a trained lawyer to decide for them the collateral questions and state

for them the rules of law in accordance with which they are to decide.

As before stated, there is no intention now to go into the history of its development. Is it not written in the pages of Pollock and Maitland's History of English Law, of Stubbs' Constitutional History of England, in Forsyth's Trial by Jury, in the researches of Brunner and Gneist and their German brethren, and, perhaps, for us, plainest and best set forth in Professor Thayer's Preliminary Treatise on Evidence?

The Norman kings had brought in the Frankish practice of ascertaining facts necessary to be known in levying taxes and in determining the rights of the crown by a sworn body of inquisitors who should state these facts on oath. The Doomsday book itself is a collection of such findings whose name suggests its connection with the old Saxon dooms-men. Henry the Second, in his famous assize of novel disseizin, provided that a similar process should apply to learn the true ownership of land where one claimed to have been recently dispossessed unlawfully. A similar process was granted where one was prevented from gaining possession on the death of an ancestor; and a similar inquest was provided in case of one who had been presented to a church living and ousted by a stranger. These regulations seem, however, only to have rendered obligatory in certain cases a mode of trial already in use by special writ, and through the judges voluntarily making use of it, not only in these, but in other cases.

Trials by ordeal were practically abolished by the church forbidding its priests to take part in them. Compurgation was done away with by royal order, and the calling of a jury to ascertain, first, if a person should be accused and put on trial before another jury became the established practice in Great Britain more than five centuries ago.

The practice of calling in good men of the vicinage, which the Angevin kings had resorted to in their struggle with the priesthood and the nobility, now came to be appealed to against the crown itself, and under the Stuarts the jury became the whig pamphleteer's "palladium of liberty." It seems to me that the apparent destruction of the popular element in English jurisprudence was its salvation, and we must recall how, in our system of law, the lawyer and the jury are correlative elements in a public and popular administration of justice and dependent upon each other.

The Norman tyranny, in placing this institution under appointed judges and making it strictly subordinate, and merely required to answer the specific questions propounded in an *inquisitio* and later in a *recognitio,* had saved the popular element in English jurisprudence. In the other Teutonic countries a similar popular organization of courts once prevailed as among the Anglo-Saxons. Among the Saxons, law-men and dooms-men, generally twelve or some multiple of twelve chosen from the people by some office or method appointed by custom, settled disputes and gave justice among the Gothic tribes and their descendants. Their power and the lack of skilled supervision over these popular tribunals proved their undoing. The unskilled judges of both law and fact were found hopelessly incompetent as society and laws developed and became complex. Their place was taken by judges skilled in the law, by whom both the facts and the law applicable to them were determined, and whose tenure was permanent, and the popular element of their jurisprudence became as wholly lost as did that of the Romans under the empire.

In England the energy of popular feeling among both lawyers and laity was such that the judges themselves spread this mode of trial, by extending its application, so that by 1436 a statute correcting certain abuses recites that "the trial of the life and death, lands and tenements, goods and chattels of every one of the subjects in this kingdom, touching matters of fact, remains and stands, and from day to day probably is to be made and had by the oaths of inquests of twelve men duly summoned in the King's courts." Because the royal judges of the Norman kings were jealous of the old folk moots and county courts, and would grant writs of prohibition against their proceeding in matters which had been or were intended to be brought before the royal judges, the popular courts fell almost immediately into disuse. Because those judges only made periodical circuits for holding *nisi prius* courts and found themselves on unfamiliar ground, they were forced to call to their assistance local knowledge and a machinery of inquisition already in use by the royal exchequer, if, indeed, it had not been originally borrowed from the Roman *fiscus.* Under their jealous supervision these *jurata* were allowed only to find the facts as to the matters specially submitted to them. The collateral questions were summarily decided by the royal judges, as were all questions of

law. The old attachment to their popular tribunals soon transferred itself to the verdicts of these *juratores*. If their function was limited, it was well defined and scrupulously respected by a great line of judges who perceived that their own power and consequence depended upon the respect given to the conclusions of the jurors through whom they worked.

Humanity has no doubt been much the same in all the ages. Beyond question it has always been as true as it is now that a decision at law, not finally accepted by practically all of the community for which it was pronounced, as being just and right and worthy to make a precedent, is doomed to remain a failure. It did not require the sagacity of a Vaughan, a Sir Thomas More, a Coke, or a Sir Matthew Hale to perceive this. Neither could they fail to see that while they kept the confidence of their jurors, and adhered to the precedents already given for their guidance and to sound principles of current morals, they could make the decisions themselves and have the parties concerned attribute them to the jurors from the vicinage.

There is no doubt that the making of the jury in the assize of novel disseizin a matter of right was merely establishing as a uniform practice what was already a frequent one of the royal judges. It is equally certain that the spreading of this mode of trial over all branches of legal procedure in the next two centuries was equally a matter of judicial and legal practice rather than of either royal or popular desire. It appears from the statute quoted that from the beginning the function of the juries was to decide "touching matters of fact." It might have been restricted still further to "matters of fact" touching the essential issues of the dispute. The collateral questions were summarily decided by the judges.

It has been remarked that in this restriction of its functions lay the secret of the jury's preservation as a vital element in English law. When, in the Scandinavian and German countries, the decision of intricate legal questions, as society advanced, by laymen selected from the body of the people became an absurdity and an impossibility, the reformers adopted outright for the most part the later practice of the Roman empire, and the popular element in their jurisprudence disappeared. The process of change was put off until the central authorities in those countries and the influence of Roman law were strong enough to set aside, more entirely than

could the conqueror's successors in England, the people's voice in their own litigation. And yet that same Roman system had once possessed the same element which our jury provides, viz., a lay adjunct to the judicial system to which was delegated the determination of the specific issues of fact in each case. The *formulae* in the days of Roman greatness had contained the law and pleadings of the case and were fixed by the magistrate. The case was then sent for trial before a layman *judex* or *judices* who found the facts, and on these the magistrate's judgment was rendered. Sir Henry Maine finds the peculiar excellence of the Roman law to consist in the fact that it was developed out of a code presumed to contain everything necessary along the line of principles by the responses of the jurisconsults. These, he says, gave it its early wealth of principles. These took their form from the *formulae* in which cases were prepared for hearing before the layman *judex*. They were the foundation of the great legal treatises that were later consolidated into the *Corpus Juris*. By that time the *formulae* had been long disused. The jurisconsults had their functions practically destroyed by early legislation of the Empire under Augustus, but the popular lay tribunals had done their work and the Roman system was established. Sir Henry Maine tells us the seizing of it into the hands of elected officers and lay tribunals out of the hands of the priesthood to which it had first belonged was the first great step in its great career. Its development out of the twelve tables by praetors and jurisconsults followed. It had to be fitted to the tribunals. The English law was in theory developed out of an immemorial tradition, not by jurisconsults answering freely as to all cases actual or supposed, but by judges passing upon actual facts before them; hence, the characteristic excellence of English law and its regard at once for justice and for precedent.

The existence of these great systems that divide the world between them seems to be due precisely to the retention of this popular element throughout their growth. This was the condition on which the free countries in which they grew up with a real popular government in each case could tolerate them. Their growth into world-conquering systems seems to show that this popular element was not by any means a source of weakness.

It needs no argument to show that of itself it need not be. The lawyers here do not need to be told of the danger of substituting

an artificial for a true conclusion that follows from a too technical course of reasoning. The strongest judge, trained to help himself with artificial tests for truth, is not safe from mistaking his means for the end sought. He is liable to find in an artificially ascertained preponderance of evidence a sufficient reason for accepting as true a conclusion which a strong practical intelligence, acting directly upon the matter, would at once pronounce false. Mr. Hawley in his Infallible Logic has constructed an ingenious apparatus of small squares made by parallel horizontal and parallel vertical lines, by which he declares his ability to infallibly determine the truth or falsity of a proposition. By placing in their proper squares the several minor premises assumed in the given statement and manipulating them, he can show, he says, without fail, whether or not the given proposition falls on the true or false side of a given test line.

Examining his apparatus, it seemed to me not altogether unworthy of his claims. An effort to apply it practically developed that, so far at least as I was concerned, the labor of analyzing out the really fundamental premises and their right location among the squares was greater than that of solving the main question by ordinary methods. Something of this kind results from applying laborious legal methods to ordinary questions of fact. The practical sense that seizes the main problem and gives it a prompt solution is often nearer right than is subtle analysis.

Not altogether without foundation is the complaint that artificial legal rules dull the sense of right. Colonel Ingersoll's bitter gibe at his own profession is not altogether baseless. Denying the assertion that Shakespeare was a lawyer, he says, "He a lawyer! the man who wrote these plays had never dulled his sense of justice by the study of English law." There is a letter that killeth. The remedy for this is to have our legal doctrines constantly reduced to the plain and direct form necessary for their application by lay jurors. They must be constantly tested by the direct sense of justice and responsibility felt by the people's own tribunals.

But it is not necessary to justify the existence of the jury to this Association. It furnishes an indispensable element to making that balance of rigid rule and flexible equity which must concur to form a great and growing legal system. To have law at all, there must be uniformity. The new cases must follow the old precedents, else

there is no rule. The new cases must be decided on their own merits, or there is no justice. With no regard for precedents, caprice would rule, and only change would be the order of the day, as is said to have been the case in the Greek democracies. With no power of change a stagnation like that of the Orient is inevitable. The Moslem countries show what would happen. The solution was found in ancient Rome by introducing the layman to pass on the facts. In modern states governed by the Roman law it is found in bringing him back again in imitation of English example. That the strength of the English system, which has made it the only dangerous rival of that of Rome, comes from the successful development of its jury seems clear.

But the jury is not only made by the lawyer; it makes him. Why is the lawyer such a feature in all English-speaking countries? Clearly because he is the instrument of popular justice. His professional work brings him constantly in contact with the people. His conceptions must be simplified and strengthened till they can be laid before his unprofessional countrymen so as not only to be understood, but felt. For they must be acted upon. The results of the application of legal rules must be made plain enough to seem inevitable to the unlearned. The task calls for all his powers and gives him an unparalleled training and, when successfully performed, an unmatched influence.

By no accident the lawyers who made American constitutions have placed in all of them a guarantee of trial by jury. They knew that when the jury disappeared from American institutions the lawyer as a great public power would go with it. Just so long as he administers a system of popular justice whose great decisions of fact are made by non-professional citizens taken from the body of the people, so long he will be an indispensable public servant.

When the time comes that our constitutions shall be changed in terms or in practice so that questions of fact also will be decided by professional judges in trials relating to fundamental rights, his occupation will be almost gone—his present public position quite so.

Sir Henry Maine thought the English character had been largely influenced by jury service, and the English mind in part derived its liking for stubborn facts from the habit of applying the law of evidence. Our distinguished fellow Nebraskan, President Woolworth,

of the American Bar Association, in his brilliant President's Address, thought that jury service, extended still more universally among the people by calling larger panels and making the time of service shorter, would be an effective antidote for socialism. That jury service should remove the narrowness from a man's mind and give him new notions of civil duty would seem certain.

But is the present tendency in our State, either among our own profession or among the laity, to exalt this time-honored institution? It is to be feared not. The grand jury is practically no longer in use. Another generation would no longer remember its procedure nor be able to work it, if it were not for the federal courts. The accusing jury was developed first and does not depart so far from its Saxon prototype as does the trial jury. A somewhat careful observation of criminal procedure leads to the conclusion that it is false economy which has substituted for the grand jury's presentment our public prosecutor's information. Crime in our communities is no longer so much a concern of the average citizen, and public interest in its prosecution seems comparatively languid. The culprit and his friends are as keen as ever for his escape, and the prosecutor's salary is just as large whether any one is complained against or not. He does not like to stir where he finds nothing but opposition and neither sympathy nor assistance. If the administration of justice is a public matter, surely the prosecution of offenses is the most public part of it.

The effort to stretch the XIV Amendment to the Federal Constitution so as to make it require that no one shall be tried for any crime except upon a grand jury's presentment failed, though urged by Nebraska talent with all its force. Probably this is well. Our citizens should not be compelled by federal law to take up a burden they do not want. If they do not realize the truth of Webster's remark over Story's memory, that "justice is the greatest interest of man on earth," their action perhaps could not be depended upon to advance it.

But a feeling of indifference to, if not dislike for this institution is too common among the most influential elements in society. The real occasion of this paper is a chance conversation a short time ago with one of the influential business men of this State. His experience of courts has not been extensive, nor probably unfavorable. He said, however, that his observation of the result of jury

trials made him distrustful of them. He thought it would be far better if all trials were conducted by a court of three judges who should be lawyers of training and standing. He thought much greater certainty would come out of such trials. He was asked if the result would differ much or frequently from that of present jury trials, and he thought it might. He was asked how their conclusions could be carried into effect, and he thought the present elective officers would do, unless some special feeling arose among the people against the course of the judges. In that event he thought a military force or centralized *gendarmerie* would need to be organized to enforce the mandates of his non-popular court.

He had so far thought out the problem as to recognize that the protection of one's rights must be either the moral sentiments of his fellow citizens crystallized into law, expressed in individual cases by verdicts of juries, and carried out by the people's chosen servants, or else in some military force directed by some appointive officer and itself controlled by the strongest interest in the state.

The strongest symptom, however, of distrust of our jury system is the multiplication of appellate courts, and the introduction of delays in the enforcement of verdicts. Of course, the present constitution of our State, being a modern one, will show this. We find accordingly that the right of appeal to the court of last resort is secured by its terms in all cases. The same instrument, however, makes such scanty provision for that court that the court was some five years behind and going farther every day, when the last legislature interposed the temporary expedient of a commission, against which there are so many valid objections that the only possible justification for it is necessity.

The one power that is capable of overcoming the inertia of the people and changing our constitution in this particular is the bar of the State. The lawyers of this State, if united and in earnest to do it, can procure the passage of an amendment to the State constitution that will enable our court of last resort to deal successfully with its business and pass in a reasonable time upon verdicts reached by our juries.

One element of weakness would thus be removed. The distrust of the tribunal which is to decide questions of fact for us under our system could be reduced by a little additional safeguard as to publicity in the drawing of jurors, and as was suggested by President

Woolworth to the American Bar Association, by making larger panels and allowing more citizens to serve. In this way more challenges might be allowed, and the real danger in jury trials, a prejudiced verdict, less often incurred.

Perhaps a more important change, and one more consistent with many precedents, would be to repeal the provision that judges in our state courts shall not comment on the evidence. Instructions are always liable to become more or less skilful evasions of this requirement. A distinguished friend whose practice has been mostly in the federal courts once held up his hands in horror when told of this requirement of our statute and asked, "Why, what sort of verdicts do you get under such a practice, and with code procedure, too, with its indefinite issues?"

Verdicts we do get in accordance with the truth. The institution still remains the strongest feature of Anglo-Saxon self-government, and a factor of undiminished potency in moral and civic training of the people. The man whose calling is to get its appointed work well done by this ancient institution has, indeed, a high vocation. He must be able to uncover the grain of vital truth among mountains of inconclusive chaff. He must be able to direct and keep blowing steadily the winnowing breath that separates the true and important from the false and worthless amid all gales of passion, past all obstructions of prejudice. We get but little attention while here, and even the greatest is little remembered after he is gone. We are tossed for the moment on the waves of the time like foam on the ocean waters, till we sink beneath like the uncounted particles of silt that make its oozy bottom. But the institutions of our country grew in the long centuries before we were and will continue through an unending future. Throughout that future whatever we have done, much or little, good or bad, will go on producing its effects. Whenever we have succeeded in getting our time-honored institution of the jury to do effectually its appointed work, and made it against chicane and wrong declare the truth, *veritatem dicere,* as the old oath is recorded, we have done something to maintain free institutions and the dignity of mankind. And as often as our incompetency and weakness, or still worse our own ill-doing, has given wrong the advantage and registered an unrighteous verdict, liberty has been wounded in the house of her friends and our children's future clouded.

Meanwhile, if the men, such as they were of those old days, with the material at their command could do such things, if an avaricious and vindictive Henry the Second, who did not hesitate to suggest if not command the murder of Becket, could lay the foundation for the modern jury in our law, and the too-often ignorant, tyrannical, and self-seeking, if not corrupt, judges and lawyers, who developed it, could bring it to such a degree of perfection as we now see, surely we are warranted in hoping that Providence can do something even with our results. If the course of humanity has been wavering, it has been on the whole forward. Out of the barbarous tribunals of the distant past, out of trial by battle, by ordeal, and by compurgation, the rational one was finally developed and has survived. There is need for heedfulness, but not for fear. We should remember that the Norman invasion that seemed to annihilate the old popular courts furnished only the limitations on their action that were necessary to make our jury the center of development of the greatest modern legal system. A severe pruning is often the condition of survival for the plant. We should go forward with confidence, but with care.

"Forward, forward, let us range,
Let the great world spin forever down the ringing grooves of change."

THE MAKING OF LAWS

A Plea for the Independence of the Legislature

BY FRANCIS A. BROGAN, OF THE OMAHA BAR

The doctrine that the courts have power to declare void an act of the legislature because violative of some provision of the state constitution has been so long settled and so well recognized that any reopening of the question at this late day would serve no useful purpose.

There are, however, some phases of the exercise of that power in the judicial history of Nebraska which, in view of the probable general revision of the state constitution to take place at no distant day, may well repay careful study.

It must be apparent at a glance that there are two very distinct groups of cases in which this power is exercised. To declare an act void because its provisions are contrary to some of the fundamental guarantees of the constitution is one thing. To say that it should be annulled by the courts because, either in its form or in its relation to previous laws, or in the manner of its passage, it has not complied with the procedure laid down in the constitution is quite another. Thus, if a statute should seek to deprive a citizen of his liberty or his property without due process of law, or to take or damage private property for public use without just compensation, to say that such an act can not be enforced is merely to assert the supremacy of the constitution and to reject the act because not within the power or jurisdiction of the legislative body. On the other hand, when the act is within the scope of the law-making power and is in itself a proper and legitimate exercise of that power, and it is found by the courts to be void because it has not been labeled with a proper title, or because more than one subject is embodied in the bill, or because its effect is to amend or repeal some prior law without proper reference to and repeal and reenactment of the former law, quite a different proposition is presented. Furthermore, when a statute which has been, with all due and ap-

parent regularity, certified to the secretary of state and placed in the public archives as a completed work of the law-makers, and it appears that it is properly within its carefully selected title, that it contains no more than the prescribed single subject of legislation and is not amendatory of any prior law, or, if so, is complete in itself,—when such an act is found to be void because it is subsequently made to appear by an inspection of the legislative journals that some change was made in its title during its journey through the two houses, or because there has been a failure to make a proper record in the legislative journals of the proceedings which resulted in the apparent passage of the act, a result has been achieved which may well give us pause. But when, in addition to all that, it is found that the validity or invalidity of an act of the legislature is made to depend upon extrinsic evidence tending to show what the legislative journals in fact contained, relative to the passage of the act, prior to the mutilation of the journals, then, it is respectfully submitted, the climax in this process of unmaking of laws has been reached.

In the exercise of this power there has been a gradual but well-defined growth and a very apparent encroachment upon the powers and prerogatives of the legislature. It is now a matter of history that the courts assumed the task of annulling legislative acts with some hesitation. There was at first a very earnest view of the minority that the power ought not to be exercised, but that the legislature must determine the limitations of its own power, and that for an assumption of unwarranted power in the legislature, the remedy must be left to the people to elect more faithful representatives, and this view is still maintained in some quarters. But since the case of Marbury vs. Madison, it has been the settled rule in the United States courts, almost generally followed in the state courts, that it is not only the right but the duty of the court to set aside an act of the legislative body when it comes in conflict with the fundamental guaranties of the constitution. But this power was at first confined wholly to cases in which constitutional rights were attempted to be invaded by legislative act. None of the early constitutions attempted to prescribe the form of the bill nor the procedure for its passage. The constitution of the United States and the constitutions of many of the states remain in that condition. But many of the later constitutions, for the purpose of correct-

ing real or supposed evils in legislation, contain provisions laying down a procedure for the form and manner of enacting laws. In the application of these clauses there are three well-defined classes of judicial constructions. There is the view prevailing in California and Ohio, that these provisions as to the title of the act and as to containing but one subject are directory only and not mandatory; and in these states the courts decline to set aside an act for failure to comply with the constitutional procedure.[1] In another class of cases the clauses are held to be mandatory, but a very liberal construction is given to them, and legislative enactments are sustained unless there has been a clear and flagrant violation of the constitutional procedure.[2] In the third class of cases there is a strict enforcement of the procedure pointed out in the constitution. The judicial decisions in Nebraska may fairly be included in this third class, and it is probably correct to say that a greater proportion of the acts of the legislature has been annulled by the courts in Nebraska than in any other state in the Union. It has now become the settled law of this State that any portion of the act which is broader than the title will be set aside when brought under review in the courts, and that if the act contain more than one subject, even though the two subjects be in some sense connected with each other, at least one of the two must fall, and the other subject may be sustained or not, its fate depending upon whether it is so interwoven with the void provision that it can not stand alone or the latter was a chief inducement to its passage. It is also the settled law in Nebraska that, if the purpose of an act is to amend any prior law, the act will be void unless there is a sufficient reference to the prior law to enable it to be identified and the prior law is expressly repealed. This applies to repeals by implication, except that where the new act is complete in itself it may be valid although it does, by implication, repeal some portions of previous laws.

But the Supreme Court of this State has gone much farther than the courts in other states, and has held that the legislative journals will be inspected for the purpose of ascertaining whether the necessary title of the act was attached to it during its entire course

[1] Pim vs. Nicholson, 6 Ohio St., 176; Washington vs. Page, 4 Cal., 388; Pierpont vs. Crouch, 10 Cal., 315.

[2] Miles vs. State, 40 Ala., 39; In re Hanyes, 54 N. J. Law, 6, 22 Atl. Rep., 923; Cooley, Const. Lim., 146.

through the legislature. And so, if an act be introduced and passed through one house under a title which would not sustain the act, and in its passage through the other house it is amended by attaching a proper title to it, and in that form it is enrolled and certified to the secretary of state, the act will be declared void. Moreover, it has been held that, although the journals are the conclusive evidence of their recitals and statements, and can not be contradicted by evidence *aliunde,* yet oral testimony will be received for the purpose of showing what the journals did in fact contain prior to an alleged mutilation or alteration thereof.[8]

Thus we have these successive steps in the inquiry into the constitutionality of an act of our legislature. The lawyer who assumes that he can advise his client as to the validity of an act, by comparing the body of the act with the provisions of the constitution, is extremely out of date. Not only must he have at hand the complete session laws, which furnish the title of the act and the full text of the act, including any repealing clause, but, under the present rulings, he must also have access to the complete journals of both branches of the legislature, and even then he takes some chances on the possibility of alterations and mutilations in the journals before their publication.

It would seem that the courts in the exercise of their undoubted power of declaring a law unconstitutional have indulged in a nicety of criticism in regard to the action of a coordinate branch of the government which they would not tolerate with reference to their own proceedings. A final judgment of a court of competent jurisdiction may indeed be declared void when called into question in a collateral proceeding, but only for want of jurisdiction over the persons of the parties or over the subject matter; never for mere irregularity in the procedure by which it was obtained. The analogy between the case of a final judgment of a court and the final act of the legislative body as expressed in the enrolled bill would seem to be complete. The constitution and statutes by which courts are given their existence and are authorized to hear and determine causes furnish the sole ground of their action. There is as much reason for limiting the validity of the action of the courts to a case where there has been a strict compliance with the procedure pro-

[8] State vs. Frank, 60 Neb., 327.

vided for the courts as there is for holding void the act of the legislature for a failure to comply with the mere procedure pointed out for it in the constitution. To hold that an act of the legislature is void because the subject is not clearly pointed out in the title is much similar to a decision which would hold that a judgment of a court is to be disregarded because the pleadings did not contain the proper title of the case, or the affidavits and jurat did not contain the proper venue; and to hold that a law is void because the bill for its enactment contained more than one subject is precisely similar to a holding that a decree of a court of chancery is void because the bill upon which it was based is multifarious.

So much for the relation between the two equal and coordinate branches of the government toward each other in this matter of annulling legislation. But what of the public, the people for whose benefit and welfare statutes are assumed to be enacted by the legislature and passed upon and construed by the courts? How do their interests fare in this clash between the making of laws by the legislature and their practical veto by the courts? Fortunately for them, it still remains true that the great body of the laws under which they live is not based upon statutory enactments but on the principles of the common law, which still survive, and which are construed and applied by the courts with a breadth and liberality that is lacking in the treatment of statutes. Were it not so, the public inconvenience which would have resulted from the inability of the legislature to override the judicial veto would long since have swept aside the entire doctrine that laws may be declared void for irregularities in their form or in the manner of their passage. But even as it is, much public mischief has resulted from this pernicious system. Very often the invalidity of the act is not discovered until many years after its passage; or, even if the defect be suspected, the suspicion can not be at once verified by a supreme court decision. The industry of annulling laws has become so common that a case pending in the supreme court is not entitled to be advanced for immediate hearing merely because it involves the constitutionality of a statute. When at last, after many years, a law is declared void, it is held to have been void *ab initio,* and all rights acquired under it and all things done in reliance upon it must fall with it. But to this rule there is the remarkable exception that a final judgment of a court of competent jurisdiction, based upon a void statute, has been

decided to be valid as against a collateral attack, where the decision but not the jurisdiction of the court is founded on the invalid statute, thus emphasizing the fact already referred to—that the judiciary exercises a charity toward its own shortcomings which it does not observe toward a coordinate branch of the government.

To illustrate the inconvenience which the public must suffer from the application of the present system, it is not necessary to review all of the cases in which statutes have been unexpectedly annulled by the courts. A few of the glaring instances will suffice.

In 1887 the legislature passed an act providing for the filing of a notice of *lis pendens* at the commencement of a suit concerning real estate, whereby all persons holding unrecorded conveyances against the real estate were to be bound by the result of the suit. This enactment was promulgated and published as a part of the written law of the State and was acted upon by the public, by the bar, and by the courts generally, and became one of the rules of property for all practical purposes. In 1896, nine years after its enactment, it was declared by the Supreme Court to be void on account of a violation of the technical rules of procedure laid down in the constitution, and of course all rights founded upon its observance must fall with it.[4]

In 1889 there was an attempt to make some very necessary alterations in the laws relating to the descent and distribution of property and the settlement of estates. So urgent was deemed the necessity for the act that it was passed with an emergency clause, and thereupon it became, apparently, a part of the law, and was relied upon by all persons having ordinary dealings with the probate jurisdiction. In 1893, four years after its enactment, it was found void for technical irregularities in its form.[5]

In 1883 an act was passed by the legislature providing for the taking of appeals to the district court from judgments of the justice court in forcible entry and detainer suits, and many hundreds of cases were disposed of in the district courts, and doubtless some of them in the Supreme Court, on the assumption that the law was valid. But in 1900 the Supreme Court pronounced it void for a failure to comply with the constitutional procedure.[6]

[4] Sheasley vs. Keens, 48 Neb., 57.
[5] Trumble vs. Trumble, 37 Neb., 340.
[6] Armstrong vs. Mayer, 60 Neb., 423.

In 1885 a general act was passed providing for the government of cities of a certain class, and under its provisions a number of the important cities in the State were organized, and all their business conducted in reliance upon the terms of that law. Numerous obligations were incurred and rights were fixed and determined in a complex variety of ways. In 1900 the Supreme Court determined, upon an inspection of the legislative journals of the session of 1885, that the title of the act had not been affixed to it by the legislature at the proper time during its consideration by that body, and that, therefore, the entire act was void. Fortunately, in such a case, the courts are in a position to invoke a much broader and more liberal ruling than had been applied to the examination of statutes, and will be able to hold that the acts of the *de facto* corporations organized under the void law will be sustained, and all the relations of the municipalities to the general public may not be interfered with.[7]

But the most remarkable instance is that of the act of 1887, which created a State Board of Transportation and provided for its duties and functions. That act dealt with one of the most important questions of a public character. Although repeatedly attacked by the vast interests affected by it, it ran the gauntlet of all general constitutional provisions. It did not interfere with any fundamental rights guaranteed by the constitution. It contained a proper title and but one subject of legislation, and was not amendatory of any prior act. For thirteen years the Board of Transportation exercised their functions, dealt with the important problems covered within the scope of the act, and their existence, deliberations, and proceedings became an important part of the political, legislative, and judicial history of the State. And yet, in 1900, upon an inspection of the legislative journals, it was held that the entire act was void for a failure on the part of the legislature to comply with the constitutional procedure, and so the State Board of Transportation passed out of existence.[8]

In reviewing the history of the application of this doctrine in Nebraska, the most striking feature of it is the lapse of time which has passed from the enactment of the law until its invalidity has been discovered and judicially announced. It is needless to say

[7] Webster vs. City of Hastings, 59 Neb., 563.

[8] State vs. Burlington & M. R. R. Co., 60 Neb., 741.

that the effect of this condition of things has been to create the utmost uncertainty as to what laws we are living under. It is not unfair to say that the promulgation of a law is no longer *prima facie* evidence of its validity. But the greater injury to the public welfare arises, not merely from this unsettling of private rights and this difficulty in adjusting business transactions to legal requirements, but the popular contempt into which the making and interpretation of laws has fallen in public estimation. As in the enforcement of a criminal code, public order is maintained, not so much by the severity of the punishment as by the certainty of its being administered, so in the civil laws, it is not so much a question whether one or the other of two possible laws shall be in force as it is a question of certainty as to what the law is. Business conditions can adapt themselves even to an inferior law, if there is no doubt about its existence; but uncertainty in the existence of a law is one of the greatest evils.

Still another evil is to be considered growing out of the narrow provisions of our constitution and their strict enforcement. There are many necessary subjects of legislation upon which it is now confessedly impossible to draft a bill which can run the gauntlet of the constitution and the court's enforcement of it. Some years ago it was thought wise to provide for the construction of a water-power canal under the control of one of the counties of the State. Whether the measure was or was not a wise one is now immaterial. But for the purpose of this discussion it is sufficient to say that the services of some of the ablest lawyers in the State were enlisted in the drafting of a bill which would not violate the constitution. A title comprehensive and lengthy enough to embrace, as was supposed, every feature of the proposed law was devised, and the act was passed. Upon a test case being brought as to its validity, the court discovered that one provision of the law was not within the title, and that that provision was vital to the act, and was the inducement to its passage, and the entire law was therefore declared void.[9] There are, at the present day, numerous contemplated reforms in our statute laws which can not be successfully undertaken and carried out under the present constitution. Among them might be enumerated a new revenue law, a new law providing for the

[9] State vs. County Commissioners, 47 Neb., 428.

descent and distribution of property and the settlement of estates of decedents.

When the reasons which are usually given for setting aside laws for irregularities in their form or in the manner of their passage are examined and analyzed, they are found to be mostly trivial and wholly insufficient to justify the serious consequences founded upon them. They are all included in these few phrases in section 11 of art. III of the constitution: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." Let us examine these provisions in their turn.

"No bill shall contain more than one subject." The avowed purpose of this is to prevent what is called legislative "log-rolling," that is, the practice of uniting in one bill two measures, neither of which has sufficient support to command a majority, but by uniting the partisans of the two measures its enactment is secured. But the remedy by no means meets the evil, if evil there be. It is still a simple task for the experienced lobbyist to have the two bills introduced and passed separately, but by a mutual exchange of votes. Indeed many bills are passed in precisely that way, and yet this is the only reason given in the few constitutional debates in which this question has ever been fundamentally discussed, or in those judicial decisions in which the reason of the rule has been considered. It may be that the public often needs protection against the unfaithfulness of its representatives in the legislature, but the remedy must be found elsewhere than in a mere rule of procedure, which has been ineffectual for the purpose for which it was devised, and which has resulted in numerous inconveniences.

But the rule that there shall be but one subject assumes that subjects of legislation are simple in their nature, and that in every case where legislation is desired a bill can be conveniently framed containing but one subject. This is by no means the case. So complex have become the subjects of legislation, and so necessary is it in the enactment of remedial legislation to cover all phases of the matter, whether partially connected with other subjects or not, in order to avoid leaving a loophole whereby the mischief can continue after the law is in force, that it has become practically impossible in many cases to draft a bill of any importance which may

not, from some point of view, be said to contain more than one subject. And yet, from some other and perhaps broader point of view, it can be contended that all are but different branches of the one subject. This results in a vagueness and uncertainty in the application of the rule which leaves the fate of such legislation at the mercy of the judicial caprice, and the consideration of the validity of an act has come to depend upon the personal views of the members of the Court. This uncertainty as to whether the different objects covered by the one statute can be said to constitute but a single subject of legislation is well illustrated in the opinion in which the decedent law of 1889 was held void.[10] It must be apparent to any one who would undertake to draft a decedent law that numerous matters must be provided for. Such a law should cover the disposition of the real and personal property of the deceased; it should apply to cases in which he died intestate, as well as where he left a will, and should provide special rules for the disposition of property to which the homestead right attaches. Yet that act, in addition to being invalid for several other reasons, was also held void because it contained more than one subject. The court says:

"While all of the provisions are connected in some sense with one another, the connection is in some cases very remote. The descent of real property and the distribution of personalty of an intestate might perhaps well be provided for by a single statute under an appropriate title. The disposition of an intestate's homestead might, in the same way, be connected with the descent of his other realty. Perhaps even the subjects of dower and courtesy might fall within the same legislative object as the descent of lands. By a somewhat chain-like process it might be argued that provisions for barring dower during the lifetime of the husband might be embraced in any act relating to dower, and that in an act relating to barring dower the guardian of an insane wife might be authorized to convey such wife's inchoate estate of dower. But the affairs of mankind are so interwoven that by similar reasoning a single statute, proceeding step by step, might be made to embrace the whole body of the law. We can not conceive how the descent of an intestate's land can, under the constitution, be properly coupled with provisions granting to the guardian of an insane wife the

[10] Trumble vs. Trumble, 37 Neb., 340.

power to convey her prospective interest during her husband's lifetime; nor can we see how such a statute of descents and a law attaching new requisites to the validity of a will can be said to embrace a single legislative object. These subjects, while remotely related, are not necessarily interdependent, and can not be said to combine into a single subject of legislation."[11]

The uncertainty which must attend the application of this rule is well set forth by the supreme court of Ohio, which is one of the few states that has held this provision of the constitution to be directory only and not mandatory.

"It would be most mischievous in practice to make the validity of every law depend upon the judgment of every judicial tribunal of the state, as to whether an act or a bill contained more than one subject, or whether this one subject was clearly expressed in the title of the act or bill. Such a question would be decided according to the mental precision and mental discipline of each justice of the peace and judge. No practical benefit could arise from such inquiries. We are, therefore, of the opinion that in general the only safeguard against the violation of these rules of the houses is their regard for, and their oath to support, the constitution of the state."[12]

"Which [subject] must be clearly expressed in its title." This provision is not intended, as might be supposed, to furnish a convenient index to the laws, since in the compiled statutes, through which laws are made known to the public, the titles are dropped and the compiler makes his own index. The professed object to be obtained by this clause is to enable the prudent member of the legislature to distinguish a good bill from a bad bill by its title, and to keep the unwary but conscientious member from supporting pernicious measures surreptitiously inserted in the bill, but not pointed out by the title. Doubtless, also, it was intended to enable the public to watch the progress of bills and bring such pressure to bear on the member as might seem desirable. Now the reasons assume that the legislator determines his vote by a consideration only of the title of the act, and that the public will have no other knowledge of the provisions of a pending bill except as indicated in the title.

[11] Trumble vs. Trumble, *supra*, 345.

[12] Pim vs. Nicholson, 6 Ohio St., 176.

How idle these reasons are will readily appear when it is considered that under the provisions of the constitution every bill must be read at large on three different days in each house and must be printed before the vote is taken upon its final passage. And the practice is to furnish each member with a printed copy of the entire bill weeks before he is called upon to vote on it. The general public is informed of the provisions of a pending bill, not by its title, which in many cases may be sufficient to comply with the constitutional mandate, and yet be wholly insufficient to disclose the secret purpose lurking in the bill, but the public rather learns of the pending of pernicious measures through the publicity given to them by the public press and other agencies by which the people keep guard over the deliberations of the legislature.

"No law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." If the enforcement of this clause had been confined to its original purpose, no mischievous result would have followed. It was undoubtedly the intention in the adoption of this provision to stop the practice, which had caused serious inconvenience, whereby acts were amended by a bill which provided for striking out certain words in the act at a certain place in the act, or by inserting other words or changing words. As the references were not always exact, great confusion arose in carrying out the amendment. It was undoubtedly the purpose to provide simply for reenacting the law in the form in which it was intended to be after its amendment. And a view at one time prevailed that this section was not intended to require the enactment of a repealing clause, but that the constitution would be self-operating as to that, and the mere reenactment of the law, as amended, would itself operate as the repeal of the former law. However, the settled construction is that, unless there is a repealing clause, the amending act is void. But the construction has been carried farther, and it is now the settled law in this State that, when an act is passed to amend a particular section, nothing can be added to the amended section which would not be germane to the original sections, and this strict construction has resulted in the annulling of very many of the acts of the legislature.[13]

[13] Armstrong vs. Mayer, 60 Neb., 423; State vs. Bowen, 54 Neb., 211; State vs. Cornell, 54 Neb., 72; State vs. Tibbets, 52 Neb., 228; Trumble vs. Trumble, 37 Neb., 340.

The solution of this serious condition of things can not, of course, be sought in the overturning of the established precedents of a quarter of a century. Our court having committed itself to this construction, must adhere to it so long as the present constitution is in force. It is also much to be questioned whether a solution can be found in the decisions of California and Ohio that these provisions of the constitution are directory only and are not mandatory. That in itself is a dangerous doctrine. To say that a provision in the constitution is directory is practically to say that it has no force or effect whatever. And, as is well pointed out in Cooley on Constitutional Limitations, "There are few evils which can be inflicted by a strict adherence to the law so great as that which is done by the habitual disregard by any department of the government of a plain requirement of that instrument from which it derives its authority, and which ought therefore to be scrupulously observed and obeyed."[14]

The true remedy for the evils of the system which now prevails is to omit from the new constitution of Nebraska the provisions which we have been considering. The effect of this will undoubtedly be to confer more power upon the legislature than it now enjoys, and doubtless some evils will result from an abuse of that power. But it is to be remembered that the conferring of responsibility has a tendency to beget a conscientious performance of a public duty. The legislature will never develop a better use of its powers unless it has been entrusted with the full exercise of them. The Congress of the United States is not thus hampered in the passage of laws, and it has formed a system of procedure of its own which sufficiently guards against the evils aimed at in our constitution. The constitutions of many of the other states of the Union are without these clauses, and it is difficult to point out in what respect their people have suffered from the power thus entrusted to their legislature.

In the new constitution which our people will soon be called upon to construct, the bonds which have heretofore confined the law-making power in mere matters of form and procedure should be stricken off, and the independence of the legislature should be declared. The courts will still find ample exercise for their powers

[14] Cooley Const. Lim., 150.

as guardians of the constitution, in the enforcement of those fundamental guaranties of the rights of person and property which rightly fall within the sphere of the organic law of the commonwealth.

SOME SUGGESTIONS FOR REFORM IN STATE FINANCE

BY E. C. CALKINS, OF THE KEARNEY BAR

Lawyers are not popularly supposed to initiate financial legislation, and it may seem strange that I should select such a subject for discussion before this Association. But lawyers have largely to do with what may be called the art of legislation even where they do not shape its policy; and since the general demand for a revision of the revenue laws is likely to lead to changes in the legislative, and possibly the constitutional policy of the State, respecting the finances, I feel altogether justified in seeking to interest you in some aspects of the question that have presented themselves to me as of great importance. This is especially so since it is not my purpose to discuss the question generally nor to notice the suggestions that have been most commonly made, but rather to call attention to matters which seem to have been overlooked and challenge some propositions which seem to have been accepted without question.

The loss of public funds by the mismanagement and peculation of their custodians has been a common experience in Nebraska; there is hardly a locality which has not suffered in the last twenty years; and the culminating disaster to the state treasury suggests the inquiry whether it is not, in part at least, the result of a defective system. For while we recognize a temporary laxity in political morality as one cause, we shall be wise to remember that it is a constantly recurring one which can never be absolutely avoided and must always be reckoned with. For there is no more constant factor than human nature in the long run; and it is absolutely certain that we shall in the future elect about the same kind of men as in the past, and that like character placed in like situation and exposed to like temptation will produce like result.

These considerations should lead us to inquire what makes it necessary for the State to carry in its treasuries so much money, and why it should be a lender. Is it because it is intrinsically

necessary, or is it the result of a mistaken policy and defective system?

The State possesses the supreme power to levy the tax, to say when it shall be paid, and to make it practically certain that it shall be paid at the time it is demanded; and the State knows, too, when the money can be used for the discharge of public obligations. Why, then, should it demand the money long before it is needed and accumulate the taxpayers' hard-earned money to be a source of temptation to the weak and of anxiety to the strong official, to be used to corrupt political morals and to be at intervals, perhaps, but none the less certainly and surely, depleted by the dishonest and incapable?

There is no real need of this state of affairs, and whatever apparent necessity for it exists grows out of the assumption by the State of functions that nowise belong to it, and a defective system for the collection and disbursement of the public revenues.

The first difficulty that will suggest itself to my hearers is the existence of the permanent school fund; for if it is to be maintained it is almost inevitable that it should result in the gorging of the treasury from time to time. There could be no better illustration of the fact that the assumption of benevolence by the State leads to evil than the history of this same school fund. The impeachment of the first governor of the State and the incarceration of a state treasurer in the penitentiary twenty-five years later can both be attributed to its existence; and the State will be indeed fortunate if it does not produce more than one great scandal in twenty-five years.

It might have been supposed that each generation could be depended upon to educate its own children, and that if they could not, then that they could not safely be trusted with money given them for that purpose; but the fatuous policy of seeking to insure the education of future generations by a sort of endowment made at the expense of the taxpayer of the present seems to have caught the popular fancy until its persistence has become a matter of sentiment. I have not therefore dared to hope that this mistaken policy may be abandoned in the near future. If the mischievous provision, that losses from this fund must be made good by taxation, could be gotten rid of, the question would soon settle itself by natural means. As it is, we can only hope to take such steps as shall be best adapted

to secure its prompt investment and prepare ourselves to meet the evil it brings.

But this is only one of the causes that leads to the piling up of funds in the public treasuries. The multiplication of special funds, the scheme of making one municipal obligation sacred while another is shamelessly dishonored, seems as if specially designed to keep a large amount of funds in the treasury; and the fact that the custody of the public funds has been an issue in almost every local election illustrates the extent to which this evil has grown.

It has been said that a good way to get rid of a bad law is to strictly enforce it, but I sometimes think a more effectual way is to disregard it. I recall a certain school district whose warrants were being registered for want of funds while the treasurer was loaning out at interest six or seven thousand dollars of the district money because it belonged to the teachers' fund, until one day the board took courage to defy the statute and paid out the money to redeem their dishonored warrants; and the best county treasurers we have had have been those who have sought ways to pay out the public moneys in discharge of the public obligations whenever they might do it with practical safety, often disregarding plain statutory directions; and thus proving them unwise and useless.

Without going into details, the legislature should so modify the law as to make it the duty of treasurers to do what these men, in the light of wisdom gained by experience, have done without legal authority.

But before the best results in this direction can be reached, the collection of taxes must be made swift, exact, and certain. Every consideration urges that taxes be collected with all possible speed and certainty after they are levied.

The knowledge that a tax levied must very soon be paid is a wholesome check upon the taxpayers themselves in those cases where a levy is authorized by vote; and in other cases the accountability is much more likely to be rigid where the interval between the levy and the collection is brief. A most important consideration is that the collector is much more likely to find the taxpayer in the same financial condition that he was when the assessor made his rounds. Large sums in personal taxes are lost under the present system by death, removal, and changes in the financial condition of the taxpayer in the long interval that intervenes between assess-

ment and collection; and where the tax is not actually lost, its payment is frequently attended with hardships which would have been avoided had its collection more quickly followed the levy.

But the most important reason is that a quick collection would enable the taxing officers to more accurately adjust the levy to the probable outgo, and avoid calling on the taxpayer for his money until it is needed for some other purpose than to be deposited in banks or used in the prosecution of a private business.

Under our present arrangement taxes are assessed in April, levied in June or July, and the tax warrant delivered to the collector on the 1st day of October, when the tax is said to be due; but as no inducement is offered to then pay, or penalty inflicted for a failure to do so, the tax is not practically due until February for the personal, and May for the real property, while the latter is not enforceable until the November following—a year and seven months from the time the first proceedings were taken. It is not strange that, under this method of procrastination, taxing officers have lost view of the relation between the levy and collection, and the former function has come to be a merely perfunctory imposition of all the statute allows. While some time is necessary for the assessment, equalization, and making out of tax lists, there is no excuse whatever for the long delay following the delivery of the tax warrant on October 1. The tax levied in July should be payable in October, and the sale of lands should follow the return of the tax warrant, which should not be more than sixty days after its delivery. A change in this respect could be inaugurated without hardship or inconvenience by omitting the levy for one year, and making the succeeding one payable as I have indicated.

But a prompt and certain collection is necessary to a nice adjustment between the receipt and expenditure of the public funds, and to accomplish this a return to the system of tax collectors as distinguished from tax receivers will be found necessary. As men are made, a large percentage will strain their indulgence to the limit; and this disposition must be taken into account. Since the payment of taxes can not be ultimately avoided, and heavy penalties are exacted for delay, there can be no real accommodation, and the seeming grace is really an additional burden, and should not be permitted. The warrant should require that it be executed and returned within a fixed, short period; and the collector should

be liable for a failure to exhaust his remedy within that time. Not only this, but real taxes should be payable in the first instance out of the personal property of the owner or occupant, so that the remedy of a sale of the property would need to be used in but few instances.

With these or some similar changes made in our existing law it would be quite possible to reduce the amount of public moneys necessary to be kept on hand to a minimum, which should leave little danger of a recurrence of the scandals which have grown out of our over-filled treasuries.

Probably nothing in the administration of our revenue system is more commonly criticised than the undervaluation of property by our assessors. Everybody seems quite agreed that they ought not to do it, but no one seems just ready to suggest how it is to be prevented. The law explicitly commands the assessor to value property at its real value, and requires him to attach to his work when done an oath that he has done so; but it only furnishes an illustration of how impossible it is to command people by law to do what is plainly against their own interests. Where the minor subdivision makes the valuation, and taxes are levied by a percentage on this valuation, it is obvious that the self-interest of each locality will constantly tend to push the valuation lower and lower in order that it may not be made to pay more than its just share of the taxes which are levied upon it and other subdivisions in common. There is no saying how far this might go if it were not checked by another provision of the law which limits the levy of taxes to a percentage of the valuation.

This policy of limiting the rate of levies is initiated in the constitution, which provides that county authorities shall never assess taxes the aggregate of which shall exceed one and one-half dollars per hundred of valuation, unless authorized by a vote of the people; and the legislature has followed it until every tax is limited to a certain rate upon the valuation. This being the fact, the local authorities, who practically control the valuation, are prevented from depressing it so much that the necessary revenue for local needs can not be realized; so that the necessity for raising revenue for local purposes operates as a check upon the tendency to lower valuation so as to escape general taxes.

In some states the state board of equalization apportions in a

gross sum, according to their estimate of the value of the property in each county, the amount of state tax to be raised by such county, and the county board in turn apportions in gross the amount to be raised by each township. Under this plan there is no equalization by rates, and the rate of each locality is determined by dividing the total amount of taxes to be raised by that locality by its assessed valuation; and it follows that no two localities necessarily have the same valuation. It is obvious that under this plan, if the work of equalization is fairly done, it then makes no difference whether the property of a certain locality is assessed at its real value or only at a fraction of what it is really worth; yet even there, there is a tendency, though not as marked as with us, to assess property at very low rates.

It will be readily observed that the plan of limiting the rate upon the valuation has no application in such a system; and the adoption of such a scheme in this State would revolutionize our entire system, and would be entirely impracticable. The only way I can suggest to force the assessors in this State to assess property at its fair value would be to go through the constitution and laws; and wherever the rate of tax is fixed or limited, reduce the rate by a divisor which, used as a multiplier, would raise the existing valuation to a true one. To illustrate, should you find that property is to-day valued by your assessors at one-fourth of its true value, reduce the rate of levy now authorized for each purpose to one fourth what it is now, and I think you would soon find your valuation multiplied by four. While it would no doubt be better for many reasons to have property assessed at its full value, if it could be done without increasing the burden of taxation, it would be exceedingly dangerous to go to a higher valuation without some such precaution as I have indicated, for it would in effect raise the limit of taxation for every purpose to such an extent as to amount to a practical repeal of all laws limiting such rate.

I have refrained from entering upon the broader aspects of the question of taxation, but it should always be remembered that the power to tax is exercised in derogation of liberty, and that its only justification lies in the plea of necessity. From this it necessarily follows that the best system of taxation is that which places the least burden upon the productive energy of the people; and that the presumption is, and always should be, against the extension of the right for any new purpose.

In all legislation it is difficult to predict the exact result of a given enactment, but this is especially true in revenue matters. Lawyers who find it their business to enforce, or, if you please, to prevent the enforcement of law, gain some valuable experience which should qualify them to better surmount that difficulty.

And I make these few suggestions, confident that if there is any value in the seed it will not have been cast upon stony ground or by the wayside.

IRRIGATION

BY C. C. WRIGHT, OF THE OMAHA BAR

It is not my purpose in this paper to discuss all of the questions connected with the subject of irrigation nor to make a brief upon the law, but more particularly to direct the attention of the bar to the condition of the law as it at present exists in the State of Nebraska, and suggest a solution of the question of the rights of riparian owners.

It is somewhat difficult to cover the subject in the reasonable limits of the paper upon an occasion of this kind without assuming a considerable familiarity on the part of the bar with the conditions in the State and decisions of our Court.

The subject of irrigation is not a new one. The practice of irrigation is of very ancient origin and was especially familiar to the ancients and to their descendants on the Asiatic continent. The entire agriculture of both ancient and modern Egypt was conducted by the natural irrigation of the Nile. From time immemorial the rivers of India have been applied to irrigation, and the inlands of India are dotted with reservoirs for the storing of water. Spain and Italy have long been engaged in irrigation. Upon the discovery of this continent, the art and practice of irrigating was common in Mexico among the Aztecs. It was not, however, common or practiced to any considerable extent in any of the countries in which the common law was in force until a more recent date. At the organization of the government of the United States it was practically, if not entirely, unknown to the law of England. All the light as to the rules of law to be applied which history gives us is drawn from countries under the civil law or from heathen countries that were without a definite system of jurisprudence.

Under the common law of England and of this country, as applied to its early history, there being no necessity for irrigation in the countries then settled, the law in reference to the right to water and the rules regulating its use and the purposes to which it might be applied were established without reference to its use for irri-

gation. Under the English decisions, water was considered in character free and common as the air, and there is scarcely a recognition of a private ownership in waters, except perhaps as applied to springs and small bodies of water. But in the early history of jurisprudence a certain right of the individual was recognized in the flowing waters of the kingdom. The streams of that country which were above tide water were, for the most part, small and were of a regular and continuous flow. The public policy, founded upon the public necessity, required that those streams should be allowed to flow at their accustomed wont. They were in olden times the only source of power, and were necessary not only for power but for domestic use. No question of the right of the bank owner in the tide water streams was ever raised in England until in 1875, of which I shall speak later. All the decisions of that country were in reference to non-tide water streams which were, by the law of England, non-navigable. By the law of England, too, the title to the bed of all streams above tide water vested in the owner of the bank, the owner of the bank on either side being the owner to the thread of the stream, which in all of the streams of England was a comparatively fixed and definite point. As to whether the rights of the bank owner arose from his ownership of the bed of the stream, or from the fact that he was the owner of the land adjoining the stream, was not discussed or decided, as I have said, until 1875. But all of the decisions relating to the riparian rights had been in cases in which the bank owner did, by the laws of that country, own to the thread of the stream. It should be remembered, also, that doctrines of riparian rights as established by common law are not the result of statutory enactments, but the decisions of the courts, founded, as I have said, upon public necessity; so that, in determining the applicability of the common law doctrine, we must bear in mind the conditions and public necessity under which they were established. Upon the organization of our government, while the various states adopted the common law except as modified by statute, there very early began to be a modification of the rules in reference to riparian rights suitable to the different situations and different necessities existing in this country. Not that there was at that time any thought of the question of irrigation or the necessity of applying the water of any of the streams to the land, by which means the flow should be lessened, but the

rivers in the eastern portion of this country were so large and of such a character that they were in fact fitted for navigation, and the states early began to decide that the question of the ebb and flow of the tide did not determine the navigability of a river, but its classification was determined upon the fact as to whether or not it was capable of navigation. Hence the states, many of them, held that the larger rivers were navigable and that the title of the bed of these rivers, like the title of the beds of tide rivers, belonged to the government; and that since the states had received the grant from the English government the title to the bed of navigable streams belonged in the state rather than in the general government. In this view they were confirmed by the Supreme Court of the United States holding that it was competent for the state to determine by its judiciary to whom the title of the bed of navigable streams belonged. And later, upon the admission of new states, which were admitted with equal right of the original thirteen, it has become the established rule that the title to the bed of navigable rivers and the control of the waters thereof, even in new states, belongs to the state, being granted as an incident of their organic acts. Such is the holding of this State by dictum in 45 Neb., 798.[1] Out of this doctrine has arisen the idea as a necessary incident thereof that the waters of the State in navigable rivers belonged to the State, subject to such control for interstate navigation as the general government may deem necessary. I mention these facts because the whole subject of irrigation must depend upon the right of the State to control the waters of the State, and because the whole question of irrigation is intimately and necessarily connected with the doctrine of riparian rights. The right to the use of water for irrigation purposes is in some views an amplification and extension of the doctrine of riparian rights to the conditions arising in the arid and semi-arid portions of this country; and partly in some views a denial of the rights of riparian owners. It is not a question of the fact of riparian rights, but a question of how far and when such rights attach.

The history of our present laws on irrigation would be interesting, but the limits of this paper would not permit more than a brief summary of the origin and growth.

Upon the discovery of gold, particularly placer mining, in Cali-

[1] Clark vs. Cambridge & Arapahoe Irrigation & Improvement Co.

fornia, it became necessary for the successful workers of those mines to use the waters of the streams, and, among the miners in that State, a sort of common law, or rather a rule adopted by universal custom, was recognized, that the man first appropriating and using the waters of any stream had a prior right thereto. As between two appropriators for the same purpose there could be no question of the justice and equity of such a rule, and it was thoroughly recognized by the decisions of the coast states. When the doctrine came to be applied against the rights of the bank owners of the stream who were using for domestic purposes and for power, a serious conflict arose, and the decisions of California are not uniform or consistent upon the question. In order that the matter might be in some measure settled, the lands of that country being at that time for the most part in the general government, the Congress of the United States in 1866 passed an act giving the appropriators and users of water a superior right to the waters against those who should afterwards settle upon the public lands. The statute, however, limited its applicability to those parts of the country in which this custom and right had been established. It would not and could not, however, affect the rights of riparian owners already acquired, nor change the rule in those sections of the country in which the custom had not become established, so that, as touching upon the question of irrigation in Nebraska, the statute perhaps has no effect, although it is true that as early as 1864 the legislature of this State recognized the necessity of irrigation in the western portions of the State, as will be later shown. The first application, then, of the doctrine of the right to water by user, as distinct from the ownership of the bank of the stream, was with reference to the mining interest, but it was soon applied to the use of water for irrigation. In the arid and semi-arid sections of this country, irrigation was a public necessity, as much so as in England the right to the usual flow of the waters of a stream was a public necessity. This led several of the states and territories of the Union to declare in substance that the ancient common law rule of riparian rights had no existence and was inapplicable to the conditions of their states. It must be conceded that the doctrine of riparian rights is in force in so far as it has not been modified by statutes and is applicable. The question to be determined, therefore, is what is the true rule as to the riparian rights, and how far it has

been and may be modified by statutory enactments. It has been settled by several decisions in this State that the common law doctrine of riparian rights was in force, but there never has been any authoritative decision as to what class of streams the doctrine applies. In Clark vs. Irrigation Co., 45 Neb., 198, and other cases the court has said in general terms that the common law rule applies, always, however, limiting the right to the owner of the land *over* or *through* which the stream flows.

The first legislature of the Territory of Nebraska provided that the common law of England, in so far as applicable and not modified by statutes then or thereafter to be passed, should be the law of the Territory. If, then, the common law of England in reference to riparian rights was applicable to the conditions of Nebraska, the then owners of the banks of streams would acquire the same rights, and none others, that riparian owners acquired by common law. If their rights become fixed and vested before any modification by statute, there can be no reasonable contention that after legislation could deprive them of their vested rights. But it is equally clear that it is competent for the legislature to change the rule of common law and that thereafter no rights could be acquired in conflict with the acts of the legislature. In the discussions of the question of riparian rights in the decisions of the State of Nebraska, there has been no thorough consideration of the applicability of the doctrines of the common law to the peculiar situation and condition in this State, nor has the effect of the early statutes of the Territory and State been at all considered. And while it may be true that the common law doctrine of riparian rights would apply in its full force to certain streams, yet it might not be applicable to other streams in the State, either on account of their character or on account of the treatment of them by the legislature. This rule is frequently recognized. In Pennsylvania, for example, in the smaller streams, the doctrine of the common law has been applied without modification, but in the larger streams, being navigable, a decided modification of the common law doctrine has been steadily maintained, denying the bank owner any right in the stream or the waters thereof other than that of free access to it. The supreme court in that State, in a very early case, held that the title of the bed of navigable streams belonged in the State, and that a riparian owner who had erected a mill upon the navigable stream without

permission of the State had no right he could protect against the encroachment of one higher up on the stream, recognizing the ownership of both the bed of the stream and the waters thereof to belong to the State and not to be subject to rights such as are attached to the small streams which flow over and through a man's land; that is, with respect to which the adjoining land owner owns to the thread of the stream.[2]

Or, again, in New York it has been held that the Mohawk river, on account of the early legislative treatment thereof, was in a different situation as to riparian rights than the other streams of the State. The court of appeals of that State, in a long and carefully considered opinion, held that the title to the bed of that river belonged to the State, and that as an incident of the ownership of the bed of the river the State owned the water, and that no riparian rights could be acquired as against the title of the State.[3] Iowa and a number of other states have recognized a similar distinction.[4] So that it may reasonably be held that the common law may be applicable to those streams which flow over and through a man's land and not applicable to those larger streams which are, in their character, public.

As before stated, in the opinions of this State, this difference in the character of the streams and the extent of the applicability of the common law has never been considered. It is true, too, that in the opinions of this State, which have decided the doctrine of riparian rights as at common law is applicable, a very loose statement of the rules of common law prevails. The courts have said that the riparian owner, as at common law, is entitled to the full and usual flow of the streams. I believe it to be true that prior to the separation of this government from England there was no authoritative decision in regard to just what use the waters of a stream could be put, other than for domestic and milling purposes. But the court of exchequer in England, in the case of Embrey vs. Owen, in 1851 declared in substance that the question of whether the use of water was justified or not for irrigation or other purposes than domestic use, as against a lower riparian owner, must be deter-

[2] Zimmerman vs. Union Canal Co., 1 Watts & S., 346.
[3] People vs. Canal Appraisers, 33 N. Y., 461.
[4] McManus vs. Carmichael, 3 Ia., 1.

mined by the reasonableness of the use.[5] Such was the doctrine of the early New England cases, and the court in Embrey vs. Owen relied largely upon the statement of Chancellor Kent in regard to the true common law rules. If this doctrine be true, then the question of the right to use the waters of any stream in this State must be determined by the reasonableness of its use, and that in turn will depend upon the conditions of the country, the size and character of the streams, etc. There can be no question that under the climatic conditions existing in this State and the character of the larger streams of the State, what would be a reasonable use of the waters would be different from that which might constitute a reasonable use in England or in other sections of this country. It is to be remarked again that all these decisions refer to streams which run over or through a man's land, and never were intended to be announcements of the rule in reference to that class of streams in which the title to the bed of the stream did not belong to the adjacent land owner.

It becomes, then, important to determine what is the fact as to the ownership of the bed of the streams in this State and whether the legislature of the Territory and State has in any way modified the common law rule in reference to these streams. It may be conceded that the title to the bed of any navigable stream within this State or adjoining it would belong to the State by virtue of the organic act organizing the State. Such at least is the trend of the modern decisions and in accordance with the decisions of the United States Supreme Court. Iowa so held in an early case in the 3d Iowa.[6] Kansas has so held in reference to the Kansas river in an opinion by Judge Brewer.[7] I know there are some, at least dicta in this State which seem to indicate a contrary doctrine, but I do not believe they were carefully considered nor that they will be sustained eventually by the Supreme Court. In 45 Neb.[8] the Court's attention was called to the distinction, but the Court gave it but scant consideration and seemed to take it for granted that bank owners own to center of streams except in navigable rivers. The

[5] Embrey vs. Owen, 6 Exch., 353.
[6] McManus vs. Carmichael, *supra*.
[7] Wood vs. Fowler, 26 Kan., 689.
[8] Clark vs. Cambridge & Arapahoe Irrigation & Improvement Co.

dicta of the court are to the same effect in 23 Neb., 690.[9] The decisions in reference to accretions do not militate against this doctrine, since accretions in both classes of streams go to the riparian owner. The supreme court of Iowa, in an early leading case, quoted with approval and adopted the language of the court of appeals of New York, as follows:

"It is impossible for me to believe it reasonable or right that the great fresh-water streams of this country ever were or should be subject to those narrow principles of individual appropriation which might fitly enough apply to the comparatively insignificant water courses which are found in England, and even in that part of the European continent where the civil law originated. It is utterly incredible that when they (the colonists) surveyed the magnificent rivers which a bountiful Providence has provided they could imagine that gifts, which from their very nature and extent were capable, not only of being enjoyed by all but of supplying the wants of all, should, by a misapplication of a principle utterly unsuited to the subject to which it was applied, be made the exclusive property of a few; in short, that because the common law has assigned the ownership of a petty streamlet in England to its riparian proprietors, therefore, unlooked for by themselves, the first settlers on the banks of the magnificent rivers of this country had acquired an exclusive right to the broad channels through which those rivers flowed. Ought we, then, in the face of this long-continued practice, and unconstrained by any direct authority either legislative or judicial, to close our eyes to the condition of things which surround us—the expanse of this continent—the copiousness of its waters—the improvements, intelligence, and wants of this age? On such a subject as this, even admitting the facts to be obscure and equivocal and the law to be unsettled, is it wise for us to disregard the dictates of enlightened reason, the suggestions of public policy, and the irresistible progression of liberal principles, resulting from the physical and intellectual advancement of mankind, and, turning backward, to resort to the circumscribed views of a less enlightened age for a narrow, insular, and inadequate rule, by which to measure the flow of our jurisprudence?"[10]

[9] Wiggenhorn vs. Kountz.

[10] People vs. Canal Appraisers, 33 N. Y., 466.

The court of appeals of New York in 1865, in discussing the right to the title to the beds of navigable streams, used the following: "Rules of law should be adapted not only to the moral, but the physical condition of the country. Had the common law originated on this continent we should never have heard of the doctrine that fresh-water rivers are not navigable above the flow of the tide; nor would our courts have been called upon to compromise the interest of the community by sacrificing truth to technicality and substance to form." I quote this for the purpose of showing not only the reason of the rule that the title to the large streams of this country vests in the state, but also for the purpose of showing that the differences in the situation and in the condition of the country are to be considered in determining the applicability of the common law.

It has been stated by text writers and by some decisions that the rights of the bank owner did not arise from his ownership of the bed of the stream, but rather from his ownership of the bank. As before stated, there was no announcement of any rule of that kind in the common law, but it was first declared, so far as I am able to find, by Lord Selborne, in the House of Lords in 1875, and was followed by a number of states in the Union. But it was not an authoritative announcement of the common law, and I think that an examination of the opinion will disclose the weakness of the reasoning upon which it is founded. The case arose over the right of wharfage on the tide waters of the Thames. It was contended that the common law doctrine of riparian rights would not apply to those waters, because the title to the bed thereof belonged in the king and not in the adjacent land owners. The Lords Justices of appeal sustained this contention, and said that there was no authority for the application of the doctrine of riparian rights to waters to which the riparian owner did not own the title to the bed thereof.[11]

Lord Selborne, in the House of Lords, admitted that this was true, but said that since there was no authority against it, the rule of riparian ownership would be applied to tide waters as well as those which flowed over and through a man's land. He based his opinion upon the fact that the right of a riparian owner was a right of nature, and said that the very term riparian owner, from the

[11] Lyon vs. Fishmongers' Co., L. R., 10 Ch. App., 679.

definition of the word, showed that it belonged to the bank owner rather than to the owner of the bed of the stream.[12] It must be conceded that the derivation of the word riparian must be a weak argument indeed in the face of the fact that all of the common law decisions were limited to the rights of the owners of lands through or over which the streams flowed. Moreover, this decision was applied only to the right of access and approach to the waters, and could easily be sustained without being authority upon the question of the use of the fresh-water streams of the country. It seems to me that the decision of the Lords Justices as to the right of a riparian owner, at least in reference to the right of the use of the water for domestic or milling and irrigation purposes, established the correct rule. Such seems to have been the idea of our own Supreme Court in every decided case, since the riparian right has been limited to the owner *over* and *through* whose land the waters flowed. In the case from New York in reference to the Mohawk river, People vs. The Canal Appraisers, 33 New York, 466, a like view of the case was taken, holding that the owner of the bed of the stream thereby became the owner of the waters of the stream, and that the title to the bed of the stream being in the State no bank owner could acquire any rights in the stream as against the State nor as against any use to which the State might put the waters. A similar rule was sustained by Judge Brewer, in relation to the waters of the Kansas river, in the case of Wood vs. Fowler, 26 Kan., 682. In the case referred to from New York, the court denied the right of a riparian owner to any damages for the diversion of the waters of the Mohawk river on the specific ground that the title of the bed of the river being in the State the State had a right to use the waters of the river in whatsoever way it pleased; and although it might divert the water from its natural channel, so as to actually destroy the milling property, the owner was without redress. They based their decision on the fact that the title of the stream was owned by the State, not only upon the ground that it was a navigable river, but upon the further ground that the legislature of the State had for long years recognized that right in the State; and I hope to show that the legislature of this State has recognized the ownership of the bed of some of our larger

[12] Lyon vs. Fishmongers' Co., 1 App. Cas., 662, 681.

rivers to be in the State; and such acts of the legislature were a recognition of the fact of the inapplicability of the rules of the common law to the larger and more important waters of Nebraska. It is probably true that we have no rivers which are in strict sense navigable waters, and yet it is difficult to see why the Platte river might not be considered navigable if the Kansas river was, and we know that the Kansas river was held by Judge Brewer to be a navigable river and that the title of the bed of that river belonged to the State of Kansas. It would be difficult to conceive of any valid reason why, if the title of the bed of the Kansas river belonged to the State of Kansas, the title of the bed of the Platte should not belong to the State of Nebraska, and we think it will be so held by the Supreme Court, if not upon the ground that it was a navigable river, upon the ground that its treatment by the general government and the legislature was such as to convey its title to the State rather than to the adjoining land owners. It is certain that the general government has been divested of its title. It is a well-known fact that the Platte river and some other larger streams in the State were by the government meandered. The Platte has been made the dividing line for surveys. In the acts of Congress providing for public surveys, provision was made for the meandering of the larger streams, those which were supposed to be navigable. The condition and character of the Platte river, known to everyone familiar with the State of Nebraska, is such that it would be absurd to presume that the government of the United States, in meandering the lots along its bank, intended to convey to the lot owner to the center of the stream. In fact, there is, during most of its course, no well-defined channel. There may be a half dozen channels, or it may sink out of sight underneath the sands. It is in places miles wide. It is competent, as before stated, for the State to pass upon and determine whether the title to the bed of this stream passed with the grant of the lands on the bank thereof, or whether it passed to the State under the Enabling Act. We are not without authority, although there is some dispute upon the question, to the effect that the government of the United States, in conveying lands upon meandered streams or lakes, conveys only to the banks of the stream. Such was the holding and is the holding of the State of Iowa.[18] Justice Woodward, in this case,

[18] McManus vs. Carmichael, 3 Ia., 1.

quotes with approval from the supreme court of Michigan (Walker Chancery, 165, 168): "The complainants do not own either the bed or the banks of the river beyond the point of obstruction. The bed of the stream is public property and belongs to the State. This is the case with all meandered streams, no part of them being included in the original survey; and the common law doctrine of *usque ad filum aquae* is not applicable to them. The public owns the beds of this class of rivers and is not limited in its right to an easement or right of way only." Such appears to have been the opinion of Judge Gantt, in this State, in the case of Lammers vs. Nissen, 4 Neb., 250. It appears to be the opinion of the Court in that case that the meandered line is not necessarily the line of the boundary of the land, but that the true boundary will be the bank of the meandered stream. This is in accordance with the Iowa decisions. It would appear from this decision that it has been recognized from the earliest history of the State that the title to the lands along meandered streams was bounded by the banks of the streams.

But we are not limited to this enunciation by the Supreme Court, which was probably but a recognition of the legislative idea. From the earliest territorial days the legislature of the Territory recognized and claimed the right to the control of the meandered streams. Some of the very first acts of the legislature consisted in grants to certain individuals to dam the channels and waters of the meandered streams of Nebraska. This was a recognition of the right of the State in and to the beds of these streams. This practice of granting rights to dam the meandered streams of the State was repeatedly exercised during territorial days and after the admission of the State. I have yet to learn of any attempt to dam or utilize the waters of any of the meandered streams of Nebraska in the early days without a grant of this power from the legislature. In one case the legislature authorized the damming of the North fork of the Platte river. Moreover, from as early as 1864 the State has claimed the right to the waters of the meandered streams. In that year the legislature recognized the necessity of irrigation in this State and authorized the appropriation and use of the waters of the Loup for the purpose of irrigation. From these legislative acts and the announcement of the Supreme Court it would appear that the State and predecessor, the Territory, ever since its organization

as a territory, has both claimed and exercised the ownership and control over the beds of the meandered streams, and that right has had general recognition throughout the State of Nebraska. The fact is that the waters of the Platte river have always been looked upon as public waters in which whomsoever chose might fish, cut ice, and use water at his pleasure. The decisions of the land department sustain the idea that the grants on meandered streams extend only to the bank of the river. Such is the intimation of Secretary Teller, in decision of January 11, 1883, in the case of Ruben Richardson. He says, "In some instances the government has regarded the land covered by non-navigable lakes as belonging to the government, and upon the drying up of the waters has caused such lands to be surveyed and sold." He further holds that the grants along meandered streams extend at least to the permanent waters. In the case of Goose Lake, Secretary Vilas in 1888 intimated that the bed of a meandered lake not navigable, which had suddenly receded, belonged to the State, and bases his opinion upon the idea that with meandered tracts the bank of the stream is the true line.

In the Cambridge-Arapahoe Irrigation Co. case in 45 Neb., the Court quotes with approval a decision from Iowa holding that the actual meander line is not the boundary, but the real bank of the stream at the time of the meander is the true boundary. The Court seemed to decide that the owner of the bank would hold to the center of the stream in a meandered stream because the same was not navigable, but we think that sufficient authority exists for treating the meandered streams in this State, especially on account of their character, the same as the commissioners of the land office have treated the meander line on non-navigable lakes, and that such is the true rule in this State as indicated by the early decision and the early legislative history.

If it be true, then, that the title to the bed of these streams became the property of the State of Nebraska and has been recognized as such, no one living along the banks of these streams could acquire any right as against the right of the State. It is true that in the constitution there is no provision like that of Wyoming, declaring the waters of the State to be the property of the State, but even this constitutional provision in Colorado and Wyoming is but a recognition of the fact that the title to the waters of those States, prior to the organization of the State, belonged to the general gov-

ernment, or else they could not be granted by it, and I think that the organic act of the State of Nebraska has passed the title of the waters of the meandered streams to the State of Nebraska as effectually as the constitutions of Colorado and Wyoming convey the title of the waters of those streams.

The present irrigation law is based upon the fact that the waters of the State are the property of the State. It is but another assertion of the doctrine which has been common from the earliest history of this State, and the only limitation upon the right of the State to dispose of these waters would be that it must be done for uses beneficial to the public. It is true that the State, no more than an individual, could take away the vested rights of its citizens, but my idea is that, on account of the repeated assertion of the Territory and State as to the control of the waters of the meandered streams, no one acquiring land since the organization of the Territory could acquire any interest or any title as against the right of the State to dispose of the waters of the State for public uses.

I have not attempted to discuss the question of the validity of our present law because I hardly think that it admits of question, but have endeavored only to make a few suggestions in reference to the question of the conflict of the rights of riparian owners and the necessity for irrigation in this State. To summarize my ideas upon the matter I suggest:

First—That the common law doctrine of riparian rights as applied to the meandered streams of this State, and particularly the Platte river, is not applicable and never has been applicable and never has been considered applicable on account of the conditions in the State, the necessity of modification of the old rule, the character of the streams, and the established public policy of the State.

Second—That the common law doctrine of riparian rights is not applicable to the meandered streams of this State because the title to the bed of its streams and to the waters thereof was vested in the State by the organic act of Nebraska, and that this doctrine of riparian rights, limiting the use of waters for irrigation, has no application to public waters, but only to those streams which may be denominated private waters or which flow through or over a man's land.

Third—That the legislative history of this State, in assuming the control of the beds and waters of meandered streams, has been

such that no one purchasing lands along the banks of such streams can claim any right as against the State in its power to divert and use the waters of said streams.

There can be no question of the great public necessity for sustaining the right of the irrigator to appropriate and use the waters of these larger streams. Public necessity is the mother of public policy, and this public necessity has been recognized by the repeated acts of the legislature. Public policy founded upon public necessity was the origin of the common law rule of riparian rights, and whenever the public necessity of this country is such that we can not apply the common law rules in their strictness, then those rules must be modified, because in so far as they conflict with the public necessity they are inapplicable. I quote from the court of appeals of New York: "Now, I think no doctrine better settled than that such portions of the law of England as are not adapted to our conditions form no part of the law of this State. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as are framed with special reference to the physical conditions of a country differing widely from our own. It is contrary to the spirit of common law itself to apply a rule, founded upon a particular reason, to a law, when that reason utterly fails."[14]

What I have said is sufficient to call attention to the importance of an authoritative and comprehensive decision as to the rights of use of water from the various streams of Nebraska.

It is earnestly to be hoped that, when the decision does come, it will not be on narrow technical lines, but that it may be conceived and written with the broad comprehensive understanding of a John Marshall, giving effect to the settled public policy of the State to encourage the use of the waters of the State in such manner as to further its material interests.

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[14] People vs. Canal Appraisers, 33 N. Y., 461, 483.

THE DECADENCE OF EQUITY

BY MR. COMMISSIONER POUND

It may surprise at first thought in this era of liberal law, when the equity dockets of our courts are overloaded and some even think we are in danger of being governed by courts of equity, that any one should assert there is such a phenomenon as the decadence of equity. But we all see and know that the separate system of equity has been for a long time on the decline, and so much of the substance of law has always been wrapped up in procedure that we should be justified in anticipating grave effects. My purpose is to show that these effects have accrued and are accruing, and that the decadence of equity as a system is involving the decadence of a substantial element in our legal institutions.

Everywhere we find two antagonistic ideas at work in the administration of justice—the technical and the discretionary. These might almost be called the legal and the anti-legal; with entire accuracy we may term them the legal and the pre-legal. For if we bear in mind that the object of law is the administration of justice, we see that that object may be accomplished, and often is, without law. Whether or not we agree with Markby that the judicial enunciation of a new rule and its application to a case *ex post facto* is of that character,[1] in archaic communities, past and present, justice without law is the normal type. Before the law, we have justice without law; and after the law and during the evolution of law we still have it under the name of discretion, or natural justice, or equity and good conscience, as an anti-legal element. Without entangling ourselves in the discussion as to the definition of law, we may say that laws are general rules recognized or enforced in the administration of justice.[2] But the very fact that laws are general rules, based on abstraction and the disregard of the variable and less material elements in affairs, makes them mechanical in their

[1] Elements of Law, sec. 16.

[2] Salmond, First Principles of Jurisprudence, 77. *cf.* Gray, 6 *Harv. Law Rev.*, 24. 1 Pollock and Maitland, Hist. Engl. Law, xxv.

operation. A mechanism is bound in nature to act mechanically, and not according to the requirements of a particular case. Common experience teaches us that, while laws tend to preserve and produce what is just and right in common estimation, "cases occur in which, owing to its necessary mechanical operation, the moral law is violated and broken by the positive law."[3] As Salmond puts it,[4] "We can never be sure in applying a general rule to a particular case, the eliminated elements may not be material; and if, peradventure, they are material, and we apply the general rule without regard to them, we fall into error. This is the great objection to the substitution of law for judicial discretion. The more general the rule, the greater is the tendency to error. But, on the other hand, the more guarded, qualified, and restricted the rule, the greater its complexity and the difficulties of its application." Between these difficulties, we seek to steer a middle course; but all the circumstances of modern life draw us to the strictly legal side, and the judge, bound hand and foot by a code and the maxim that that law is best which leaves least to the discretion of the judge, is our natural goal, not the oriental cadi administering justice at the city gate by the light of nature tempered by the state of his digestion for the time being. Although the researches of Sir Henry Maine[5] have shown us that equity is a stage in the growth of law whereby it is expanded and liberalized after the period of fossilization, as it were, that inevitably follows primitive struggles toward certainty and definite statement, we must not forget that it is also a necessary reaction in certain periods of growth towards justice without law. Clark tells us that "reasonable modification of existing law" is the fundamental idea of equity,[6] and discretionary interference with the operation of general rules in order to do justice in particular cases was obviously the original theory.[7] Indeed, we

[3] Paulsen, Ethics (Thilly's Tr.), 629.

[4] First Principles of Jurisprudence, 92.

[5] Ancient Law, ch. 2.

[6] Practical Jurisprudence, pt. 2, ch. 15.

[7] Doctor and Student, pt. 1, ch. 16, 45. Spence, Hist. Eq. Jur. Ct. Ch., bk. 2, ch. 1. Where there is no separate system of equity, there may be, nevertheless, a doctrine of permissible relaxation of rules with reference to the requirements of individual cases under certain circumstances. Ahrens, Cours de Droit Naturel (8 Ed.), 1:177. Lasson, Rechtsphilosophie, 238–39. This is often treated as a mere matter of interpretation, since the principle is concerned with the application of the rules only. Grotius, II, 16, 26. Trendelenburg, Naturrecht, sec. 83.

may refer its origin to the exercise of that same power of dispensing with the law in particular cases for particular reasons that afterwards brought about the downfall of the Stuarts. Equity, then, started as a reaction towards justice without law[8] and in its development became a system wherein the element of judicial discretion was given greater play, and the circumstances of particular cases were more attended to than the fixety of legal rules would permit. But as soon as it began to be a system, for the reasons already indicated, the scope of discretion began to narrow. A good view of this process may be had by comparing the results reached by various writers who have essayed to define equity, all of whom are in a measure right, for they have merely seized on different stages as the bases of their definitions. Maine's definition of equity has been criticised in so far as it refers to "a body of rules" on the ground that "the true and original distinction between law and equity is one, not between two conflicting bodies of rules, but between a system of judicial administration based on fixed rules and a competing system governed solely by judicial discretion."[9] But Maine's definition simply errs in being too exclusively a definition of developed equity. If we take Clark's statement that equity is "the judicial modification or supplementing of existing rules of law by reference to current morality,"[10] follow it by Maine's statement that it is a "body of rules, existing by the side of the existing civil law and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles,"[11] and add that it becomes a fixed body of rules admitting of somewhat greater freedom of judicial action, for historical reasons administered in certain fashions and for certain cases only, we shall have traced fairly well the steps in the evolution from the original equity to the modern system. And through it all, under one name or another, we shall see the idea of wider discretion, greater freedom of application, more elasticity in view of particular cases, or, to quote once more from Clark, of "reasonable view of the circumstances of the case."[12] In truth, Blackstone was not all in error, much as our

[8] Salmond, First Principles of Jurisp., 93.

[9] Salmond, l. c.

[10] Practical Jurisprudence, l. c.

[11] Anc. Law, 27.

[12] Practical Jurisprudence, 246. Bentham has called attention to the essentially arbitrary element involved in these ideas. Prin. Morals and Legislation, 17, n. 1.

modern text writers differ with him, when he gave equity the Grotian definition of "the correction of that wherein the law (by reason of its universality) is deficient."[13]

But when we have come to a *system* of judicial discretion, we are back very near to our starting point. The reaction toward justice without law has long spent itself, and the powerful forces that make for law have drawn the pendulum back. The anti-legal element has come to be a minimum once more, and the work of liberalization being accomplished, the system whereby it was brought about remains merely as an accident of judicial administration, requiring men for historical reasons to seek relief here rather than there, or in this way rather than that, without sensibly affecting the substance of the rules applied. So that while, despite the analysis of Austin[14] and the historical investigations of Maine, there are still those who think "the fundamental distinction between law and equity" is "as eternal as the difference between rights *in rem* and rights *in personam*,"[15] the growing opinion among jurists is probably expressed by Judge Dillon when he says: "The separation of what we call equity from law was originally accidental, or at any rate was unnecessary; and the development of an independent system of equitable rights and remedies is anomalous and rests upon no principle. The continued existence of these two sets of rights and remedies is not only unnecessary, but its inevitable effect is to produce confusion and conflict. The existing diversity of rights and remedies must disappear and be replaced by a uniform system of rights as well as remedies."[16] We can not well doubt that the needs of the future will bring this about. And yet, so far as such an event involves, as I shall endeavor to show that it will, the undue elimination of the element of judicial discretion, the result can not be permanent. The conflict between the two ideas, justice according to law and justice without law, will not down. To the extent that equity represents the latter idea, Dean Ames is perfectly right in calling it "fundamental" and "eternal." It was remarked long ago that law and equity are in continual progression, that "a part of what is now strict law was formerly con-

[13] Bl. Comm. 1:61.
[14] Jurisp., lect. 36.
[15] 4 *Harv. Law Rev.*, 394–95.
[16] Dillon, Laws and Jurisp. Eng. and Am., 386.

sidered as equity; and the equitable decisions of this age will unavoidably be ranked under the strict law of the next."[17] But in becoming law a principle of equity loses its quality of elasticity. Hence we may look, not unreasonably, for an action and reaction from law to equity behind this progression. To quote from Amos, "The alternative appearances of law and of equity as the mutual checks and corrections of one another are lasting and not transitory phenomena. However severely and peremptorily equity, and all the arbitrary judicial power implied in its exercise at particular epochs, may be controlled and discredited, there is reason to think its resurrection must constantly be waited for. So soon as a system of law becomes reduced to completeness of outward form, it has a natural tendency to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand. The invariable reaction against this stage is manifested in a progressive extension, modification, or complete suspension of the strict legal rule into which the once equitable principle has gradually been contracted."[18] We are dealing, however, with the present and immediate future. Although we may believe, on whatever grounds, in a resurrection of equity in the remote future, the present is a period of law. Commercial and industrial development, as Montesquieu saw in his day,[19] make for certainty. The commercial world demands rules. No man makes large investments trusting to uniform exercise of discretion. It may be that the judge's decision "will be governed by 'the social standard of justice,' but the essential point is that no human being can tell how the social standard of justice will work on that judge's mind before the judgment is rendered."[20] Hence the inevitable development from the roguish equity of which Selden spoke, which varied with the length of the Chancellor's foot,[21] to Lord Eldon's equity, which was made up of doctrines "as well settled and made as uniform *almost* as those of the common law, laying down fixed principles, but taking

[17] Millar, Historical View of Eng. Govt., quoted in Spence, Hist. Eq. Jur. Ct. Ch., 1:322, note *a*.

[18] Amos, Science of Law, 57–58. Lord Hardwicke seems to have had much the same idea (see Kerly, Hist. Eq., 175–76), and Spence makes a suggestion in the same direction, Hist. Eq. Jur. Ct. Ch., 1:416.

[19] L'Esprit des Lois, bk. 20, ch. 18.

[20] Jabez Fox in 14 *Harv. Law Rev.*, 43.

[21] Selden Table Talk, tit. Equity.

care that they are to be applied according to the circumstances of each case."[22] But one more step, namely to *apply* the principles as fixedly "almost" as those of the common law are applied, and the days of a living equity are passed. Before I come to this stage, upon which I believe we have entered, let me first call attention to the agencies by which the development and decadence of equity as a system have been brought about, that their operation may be marked in modern equity. These agencies I take to be five: (1) The introduction of the common law theory of binding precedents and resulting case-law equity; (2) as a legitimate consequence, the crystallization of equity culminating under Lord Eldon; (3) the adoption of equitable actions and equitable defenses in the common law; (4) the conjunction of legal and equitable jurisdiction in the same courts, so general in America; and (5) the abolition of the distinction between law and equity in procedure and the resulting power of courts to administer both or either in the same action. The first of these is the root of all that follow. The very thing that made equity a system must in the end prove fatal to it. In the very act of becoming a system, it becomes legalized, and in becoming merely a competing system of law insures its ultimate downfall.[23] Well might Falstaff say to an Elizabethan audience "there's no equity stirring" when precedents were beginning to be cited in the Court of Chancery.[24] The immediate beginning of the end was the adoption of equitable principles and introduction of equitable actions and defenses in the common law. This revolution, almost coincident with the crystallization of equity under Eldon and his immediate predecessors, did away with all real need of a separate *system,* while at the same time it merely infused more liberal and enlightened rules into the law, and left the element of discretion as small as ever. And although Judge Maxwell has told us that "codes do not change principles,"[25] I venture to think that a court, which no longer sees anything about a principle, which is before it to be applied, to indicate that it demands greater laxity in

[22] Gee vs. Pritchard, 2 Swanst., 402.

[23] Lord Esher's expression "equity law" suggests the nature of the change. See A Century of Law Reform, 196.

[24] See Phelps, Falstaff and Equity. Compare also the effects of the doctrine of binding precedents upon the discretion of the common law courts. 1 Pollock and Maitland, Hist. Engl. Law, 169.

[25] Code Pleading, Preface.

its application than the ordinary rules of law, will be very apt to apply one like another, and all in the legal, not the equitable way. The successive operation of these legalizing agencies has left but one step for the immediate future, namely, a complete absorption or blending of the two systems into one, and such an event is now commonly predicted by jurists.[26]

Without speculating upon the results of this impending fusion of the substance of law and equity, let us see some results already manifest in the decadence of equity as a system. The great impairment of the characteristic and fundamental element of discretion, involved in the growth and crystallization of a *system* of equity, has been remarked. But are we to say that modern equity has lost all of its real function; that it is only a historical appendage, something a little better than a vermiform appendix of the law, which the legislative surgeon must sooner or later remove? There are many that think so. In a recent history of equity we read the following statement of the causes leading to the fusion of the courts of law and equity in England: "The discretionary powers of the equity judges, as we have seen, had long since vanished, and the question now, therefore, was whether one-half of the rules affecting a class of subjects should be administered by one judge and the rest by another, or whether each should administer the whole."[27] Another recent writer says that the "distinction of legal systems was in truth only a division of legal subjects," and that "the real effect of the profession of different principles of law by different courts was to distinguish and appropriate different classes of business."[28] In other words, there had come to be merely a specialization of jurisdiction, each dealing with its special class of cases in substantially the same way. In America we have had more or less generally one set of courts with both law and equity powers from an early period, so that we could hardly take this view as it is stated. But the substance of the assertion is true. Prior to the fusion of legal and equitable procedure, the symptoms of appendicitis had appeared. The law had cast off its medieval shell. It had become modern. Its rules had become liberal, and the only grounds of complaint, as far as its substance was concerned, were with refer-

[26] Dillon, Laws and Jurisp. Eng. and Am., 255.
[27] Kerly, History of Equity, 292.
[28] Showell Rogers in 11 *Law Quarterly Rev.*, 14, 15.

ence to minor details or based on the inevitable results of the mechanical action of any legal system.[29] On the other hand, equity had developed refinements and technical doctrines and was operating at some points no less mechanically than the law. A remarkable example is furnished by the English Judicial Trustees' Act. The principles of equity as to liability of trustees had become so well settled and were so fixed in their application that all room for discretion in a subject particularly requiring it was gone. As a result, unconscionable beneficiaries were able to use the principles of equity to work injustice until the legislature was compelled to intervene. When a statute is necessary to make equity do equity and to prevent its doctrines from working wrong and oppression, we may well speak of decadence in this connection. We have come a long way from the Chancellor who said that the law of his court was in no wise different from the law of God.[30] This is not a unique example. One might mention precatory trusts, a doctrine of "officious kindness," as James, L. J., called it, which created trusts where they were never intended, and, as trusts became technical and one might almost say legal, were attended with mischievous consequences. If it be said that we are happily rid of these, instances of the hair-splitting propensities and the casuistry of modern equity[31] are not far to seek. Only a short time ago Lord Blackburn, one of the greatest of modern judges, had occasion to say of a decision: "It seems to be justice; but whether it is *technical equity* is a question which I think is not now before the house."[32] In another case, hardly ten years old, Lord Bramwell said: "Equity allows itself to be circumvented when it interferes with people's bargains. What Lord Compton has been charged is about ten per cent on the sum borrowed with compound interest. I suppose at his death the sum due from him was about £20,000. If he had agreed to pay the £10,000 and ten per cent interest, and there had been no agreement to insure, the appellants would have

[29] Moreover, the law preserved a certain element of discretion through the operation of the jury system. Every practitioner has had occasion to feel the force of Coke's remark that "the jury are chancellors." Hixt vs. Goates, 1 Rolle, 257.

[30] Y. B., 4 Hen. 7, f. 5.

[31] These terms have been applied by the learned editor of the *Law Quarterly Rev.* more than once in commenting on recent cases in the Chancery Division.

[32] Brooks vs. Blackburn Benefit Soc., 9 App. Cas., 866.

laid out half the annual amount for insurance, and on his death kept the sums insured. Can they be considered to have done that or its equivalent? *The resulting figures would have been the same.* I think not. *The rules of equity may be evaded, but must not be infringed.*"[33] One can not read this without feeling that the court was conscious of applying a technical rule, which it had no intention of carrying a whit beyond its letter. It was looking at the form of the transaction, not the intention of the parties, and it said to them, Had you carried out your intention in another way, which would have led to the same result, the technical rule of equity would have been evaded. We can not wonder that one of the greatest of modern jurists speaks of equity as an artificial system and charges it with "excessive subtleties and refinements."[34]

But we must distinguish the refinements of equity which were concomitants of its so-called crystallization from those perversions which are resulting from its absorption into law and from the fusion of law and equity in procedure. Undeniably equity has been able to get rid of some of the former. Pollock tells us that "the Court of Appeal has been working hard of late years to bring equity more into accordance with common sense."[35] The fusion of law and equity may have helped in this, as it has certainly helped the law, by obviating the circuitous and artificial methods forced upon equity by its history. The fact that equity had to employ such fictions as constructive fraud and constructive trust to do its work gave an artificial and pedantic cast to many of its doctrines.[36] Just as equitable remedies engrafted upon common law actions have borne "equitable fruit,"[37] legal actions, made available to equitable claims, have borne the legal fruit of direct and straightforward proceedings. Such is the influence of procedure on the substance of the law, that this brushing away of the circuitous methods of equity is a great gain to the system. But the fusion of law and equity has developed new difficulties, and there are not wanting indications of serious results.

It is remarkable that of the many codes and statutes which pro-

[33] Marquess of Northampton vs. Salt, 1892, A. C. (Eng.), 1.
[34] Pollock, Essays in Jurisp. and Eth., 73.
[35] l. c. 74.
[36] See Pollock, Law of Fraud in British India, 41.
[37] Austin Abbott in 7 *Harv. Law Rev.*, 77.

vide for the so-called fusion of law and equity so few have provided for the supremacy of the equitable rule in case of conflict. Such a provision is contained in the English Judicature Act and in the Connecticut Practice Act of 1878. Of course we all assume that the equitable rule must prevail in such cases,[88] statute or no statute. But the fact remains that in practice this has not always been the event. Disappearance of equitable rules, however, has not been the only untoward result. Examination of the current reports will disclose four tendencies in the amalgamated system: (1) Legal rules superseding equitable rules in certain cases, (2) equitable rules, or portions of them, disappearing, (3) equitable principles becoming hard and fast and legal in their application, (4) equitable rules becoming adopted in such way as to confuse instead of supplement the legal rule. I shall endeavor to give a few examples under each head.

Our own State furnishes a conspicuous example of the superseding of an equitable rule by a legal rule. It was an old, well-settled, and eminently characteristic rule of the common law that a man could not grant or charge anything which he did not then have. This rule operated in many ways. A will being regarded at common law as a species of conveyance, it had the effect of preventing devises of after-acquired realty, and compelled legislative interference. It was applied to sales and mortgages of personalty, and required the interference of equity. The equitable doctrine was that the assignment of or charge upon a future interest was a present contract to take effect and attach as soon as the *res* came into being. Under that view of the matter, there was no difficulty in enforcing the assignment of a mere expectancy, when once that expectancy had materialized. Hence in equity between the parties thereto such mortgages, transfers, or assignments were upheld. In Lamphere vs. Lowe, 3 Neb., 131, the question came before the Supreme Court of this State. Had the action been in replevin or trover, or of some *ultra*-legal character, we might have understood a judicial oversight of the equitable doctrine. But, of all possible proceedings, it was a suit for an injunction, in which a decree had been rendered recognizing the lien. In the opinion of the court, reversing this decree, no mention of the equitable rule is made.

[88] Dillon, l. c. 368.

The rule of the common law is laid down in all its rigor, and we are cited to Bacon's Abridgement, a case from Maule & Selwyn, and four early cases from Massachusetts, a jurisdiction where for a long time equity had no foothold. No text on equity and no equity report is referred to. A succession of cases to which I need not refer has rooted this rule of the law firmly in our jurisprudence, and I am informed that several of the district courts have even held that contracts to create charges upon or to deal with things not yet in existence are of no effect as contracts. It has been applied also to provisions in a lease whereby a landlord sought to secure a share of the crop reserved as rent.[39] Our State is not alone in this matter. In Kansas it was held recently that a mortgage of clay in a bank and of bricks to be made therefrom created no lien on the bricks.[40] A reviewer in one of the periodicals says in commenting on the latter case that "the whole subject should be left to equity."[41] But is it not left to equity, under our codes, when it comes into court? Where there are separate courts, or where law and equity are administered in separate proceedings, it is easy to say that a subject should be left to equity. Under the Code, there is only a choice of rules. The result shows how dangerous this may be to many just and sound rules of equity. The instance I have given is not unique. Before I pass to the next head, let me give one more. It is a fundamental rule of equity that one who wrongfully holds trust funds with knowledge of their trust character is a constructive trustee for the beneficiary. In equity the property is in a sense that of the beneficiary, and under the Code one would expect, if anything, to see the circuitous method of constructive trust yielding to some more direct enforcement of liability. What shall we say, then, when we find a legal principle asserted to defeat it altogether? In a recent case,[42] a servant of the trustee wilfully misapplied trust funds in his hands. Instead of proceeding on the theory of constructive trust, the court held that he was not personally liable for the reason that a servant can not have possession.

The second head, disappearance of equitable rules or of por-

[39] Brown vs. Neilson, 61 Neb., 765.

[40] Townsend vs. Allen, 62 Kan., 311, 62 Pac. Rep., 1008.

[41] 14 *Harv. Law Rev.*, 626.

[42] Hodgson vs. St. Paul Plow Co., 78 Minn., 172, 80 N. W. Rep., 956.

tions of them, is closely connected with that just considered. Here, again, let me start with our own State. In Hart vs. Dogge, 27 Neb., 256, the second paragraph of the syllabus of the court reads: "Where property which has been purchased with money held in fraud of creditors advances in value beyond the legal rate of interest, the creditors, nevertheless, in subjecting the property, will be restricted to the purchase price with legal interest thereon." One can see that the creditors ought not to have the property, but only a charge thereon to the amount of their debts. But to say that the trustee could speculate with the trust fund, and, when the speculation resulted favorably, pocket the proceeds earned with creditors' money seems startling. I am not here, however, to criticise the decision, but to call attention to the theory on which it proceeds, as illustrating the disappearance of equitable doctrines. The court does not work out its conclusion on the equitable notion of a trust. It takes the liability of the property purchased with the money held in fraud of creditors as a settled rule, and proceeds to apply it as it would any legal rule. The defendant had $5,000 of the fraudulent debtor's money. He bought the land with it. The law is that creditors may follow the money and charge the land. Very well. The land will be charged with the payment of the $5,000 and lawful interest. The method is purely legal, and that, too, in a creditor's suit. The best of courts may make mistakes. But such modes of handling the doctrines of equity are far more dangerous than any mistakes could be. By merely treating an equitable doctrine as a legal rule, the principle as to speculation in trust funds is completely eliminated. Nor is this a unique case in our reports. Many courts have had difficulties over the case of a devisee, heir, or beneficiary killing the testator, ancestor, or insured and attempting to profit thereby. I shall have occasion to speak of some of these decisions again in another connection. But our case of Shellenbarger vs. Ransom, 31 Neb., 61, 41 Neb., 631, illustrates the point we are now considering. In the first ruling on that case, the court read an implied exception into the statute of descents. In the second it held, rightly enough one would think, that no power to make such exceptions had been conferred upon the judiciary. In neither case did the solution, obvious to the equity lawyer, that the legal title had passed but that the wrongdoer had made himself a constructive trustee, suggest itself. An-

other excellent instance of the effects of the reformed procedure in causing courts to overlook equitable methods and doctrines is furnished by a late case in Wyoming.[43] Plaintiff had a mortgage on some sheep. Defendant "instigated," so the report runs, a sale of the sheep by the mortgagor and obtained the money to apply on a debt due himself. The court held him liable as for conversion, and charged him, not with what he received, but with the value of the flock. The facts pleaded and proved determined what rules should be applied, and the court was at full liberty to make the defendant a constructive trustee, hold him for the proceeds that came into his hands, and thus reach a just result. It is evident that the whole equitable structure built upon the idea of constructive trust is crumbling away. Under the old procedure, such overlookings of the equitable doctrines applicable to important cases could not have occurred.

The next point, that equitable principles are becoming hard and fast and legal in their application under the reformed procedure, has received some illustration from what has gone before. A conspicuous example of the acquisition of a legal shell by an equitable principle is furnished by the law of estoppel. We now regard precedent as at least of equal weight with the equities of the case on questions of equitable estoppel. It may be said that estoppel is an equitable principle borrowed by the law, and that its fate is an incident of the general absorption of rules of equity by the law. But other equitable doctrines are going the same way. If any doctrine is distinctly equitable, it is that equity regards that as done which ought to be done. What shall we say, then, when this principle is consciously applied, as a fixed rule of law, to reach an inequitable result?[44] Specific performance is still in the special field of equity, and some lingering remnants of discretionary power remain in connection with it. What shall we say, then, to a court of the highest standing deciding a case of specific performance on what an acute critic has justly termed "a good point forensically," but without "much substance?"[45] But let me come nearer home. It is a most salutary principle of equity to hold trustees and persons

[43] Cone vs. Ivinson, 4 Wyo., 203, 35 Pac. Rep., 933.

[44] Foster vs. Reeves, 1892, 2 Q. B. (Eng.), 255.

[45] Hope vs. Walter, 1900, 1 Ch. (Eng.), 257. See 16 *Law Quarterly Rev.*, 108.

in a fiduciary relation strictly to their duty. Starting from this principle, our court has established the absolute rule that a preference by a corporation of a debt upon which the officers or directors are liable as sureties is of no effect.[46] Certainty is a great thing, and corporate officers and creditors now know exactly where they stand. Suppose, however, that twenty-five per cent of the capital stock of a corporation remained unpaid. Zealous directors, in the interest of all concerned, to procure money to run the corporate business, became sureties on the company's paper. It fails. Those who would not help the corporation in its difficulties are to be exonerated on their stockholders' liability to the extent to which the loyal and willing members lent their names; for no preference, however honest, of the debts on which they are liable can be sustained.[47] Understand me. I am not criticising. I am merely seeking to point out how an equitable principle can give us a hard and fast rule which in its necessarily mechanical operations will fall upon the just and the unjust. Another illustration is furnished by a recent decision in Kentucky.[48] It is settled that a trustee who has conveyed the trust property in breach of trust may repent and bring a suit in equity to get it back. This is a highly equitable rule, not inconsistent with the right of the beneficiary to follow the trust fund where the transferee took with notice. But being an equitable rule, one would think it ought to be applied equitably, and that it ought not to be applied when it would work inequitably. In the case referred to, however, it was held that as the trustee might have repented and maintained such an action at any time during the period allowed by the statute of limitations, and as his suit was barred on its expiration, the beneficiary was barred by what barred him, and could not maintain a suit thereafter. Thus a doctrine meant to do justice to the trustee becomes a rule whereby infant beneficiaries are barred of their right to follow trust funds by the non-repentance of the person who has wronged and defrauded them. Cases of this sort are coming to be legion, but I must pass on with only the further remark that competent critics

[46] National Wall Paper Co. vs. Columbia National Bank (Neb.), 88 N. W. Rep., 481.

[47] This point is made in Mueller vs. Monongahela Fire Clay Co, 183 Pa. St., 450, 38 Atl. Rep., 1009.

[48] Willson vs. Louisville Trust Co., 102 Ky., 522, 44 S. W. Rep., 121.

have charged such misfortunes as the failure of the Tilden will to similar hard and fast applications of the rules as to testamentary trusts. As Dean Ames puts it, equity is made to convert "a regulating principle, which depends for its life solely on natural justice, into a positive rule having no defense either in policy or in principle."[49]

The next point, that equitable rules are made to confuse legal rules instead of supplementing them, might be sustained by many examples. Let me be content here with one. I have mentioned already the difficulties which courts have encountered in dealing with the murderer profiting by his wrong. After going over all these cases, one can not but feel that much of the judicial floundering has been due to the confusion incident to the fusion of law and equity.

Are we, then, to condemn the reform which has given us one procedure instead of two, which allows litigants to adjust their disputes in one cause instead of two, which has relieved us of circuitous methods and put direct ones in their place? Surely not. To declaim against the fusion of law and equity to-day is no less futile than were the ponderous arguments of the sixteenth century sergeant-at-law who inveighed against chancery in his "replication" to Doctor and Student.[50] The moral, I take it, is simply that we must be vigilant. Ihering has told us that we must fight for our law.[51] No less must we fight for equity. Law must be tempered with equity, even as justice with mercy. And if, as some assert, mercy is part of justice,[52] we may say equally that equity is part of law, in the sense that it is necessary to the working of any legal system. We who have the shaping of the law in our hands in this era of the decadence of equity have no less responsibilities than those who pleaded and judged in its founding, its development, and its crystallization.

[49] 5 *Harv. Law Rev.*, 240.
[50] Hargrave, Law Tracts, 322.
[51] Kampf um's Recht (14 Ed.), 52.
[52] Lorimer, Institutes of Law, 314.

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